Legal Recognition of the Human Right to a Healthy Environment as a Tool for Environmental Protection in Australia:

Useful, Redundant, or Dangerous?

by

Mary Emily Good

BA, LLB (Hons)

Submitted in fulfilment of the requirements for the
Degree of Doctor of Philosophy

University of Tasmania, October, 2016.

Declaration

This thesis contains no material which has been accepted for a degree or diploma by the University or any other institution, except by way of background information and duly acknowledged in the thesis. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis, nor does the thesis contain any material that infringes copyright.

Some aspects of the thesis content have been published in the following publications:

Good, Meg, 'Water Pollution: Treated Seriously, or Seriously in Need of Treatment?' (2014) 113 *Precedent* 23;

Good, Meg, 'The River as a Legal Person: Evaluating Nature Rights Approaches to Environmental Protection in Australia' (2013) 1 *National Environmental Law Review* 34;

Good, Meg, 'Implementing the Human Right to Water in Australia' (2011) 30 (2) *University of Tasmania Law Review* 107.

Mary Emily Good

31 October 2016

Authority of Access

This thesis may be made available for loan and limited copying and communication in accordance with the *Copyright Act 1968* (Cth).

Mary Emily Good

31 October 2016

Abstract

Jurisdictions around the world are increasingly considering the utility of rights-based approaches to environmental protection, a trend which has been termed the 'environmental rights revolution'. Although Australia has not embraced this global trend, it is fortunately placed to learn from the experience of other jurisdictions which have already begun to integrate versions of these concepts into their legal systems. The aim of this thesis is to consider the potential utility of one particular rights-based approach within the Australian environmental protection context. The thesis seeks to explore whether legal recognition of the human right to a healthy environment at the international level and at the Australian domestic level might offer some potential benefits for environmental protection (hereafter 'the right'). In order to explore the possible realisation of these general benefits in a specific environmental protection context, the thesis conducts a case study on Australian water resources management.

Firstly, it outlines the nature of existing approaches to environmental protection in Australia, in order to identify the challenges currently facing environmental protection, and to ascertain whether there is room for the adoption of new approaches. It then seeks to explain why Australia has failed to embrace rights-based approaches as a possible means of addressing environmental protection. Having identified various potential rights-based approaches which Australia could adopt, the analysis concentrates on one particular rights-based approach, namely, legal recognition of the human right to a healthy environment. The legal status of the right at international law is considered, concluding that the right may be interpreted as an implied right under the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR').[1] It is noted that as the right has yet to receive explicit recognition under the Covenant, it is not yet possible to determine the precise content of the right and the obligations it imposes on state parties. Despite this, it is argued that it is possible to identify a number of potential benefits for environmental protection in Australia associated with international legal recognition of the right. Specifically, increased scrutiny of Australia's environmental protection performance, the opportunity to learn from international experiences with implementation of the right, and the facilitation of comparison

[1] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

against an international standard. The potential realisation of these benefits in the case study context of Australian water resources management is discussed. A number of limitations associated with international legal recognition of the right for environmental protection are outlined, including the fact that the obligations imposed by the right may be largely duplicative of existing international environmental law obligations, and the Australian Government's human rights record in relation to rights recognised at the international level which are not recognised under domestic legislation.

Options for domestic legal recognition of the right are then outlined, explaining that there are constitutional and legislative options for recognition in Australia. A set of potential benefits for environmental protection associated with domestic recognition of the right in other jurisdictions is explored, in order to ascertain whether realisation of these benefits in the Australian context would constitute benefits for environmental protection according to the definition adopted by the thesis. These benefits include increased prioritisation of environmental protection considerations in government decision-making, and increased avenues to bring legal actions in the interests of environmental protection. As it is concluded that the identified benefits would be considered benefits if they could be realised in the Australian context, Chapters Six and Seven discuss the potential realisation of these benefits under specific forms of constitutional and legislative recognition.

The case study of Australian water resources management is utilised to demonstrate the potential operation of these benefits in a specific environmental protection context. It is argued that although both forms of recognition are unlikely to occur in the near future, legislative recognition of the right is more likely to be accepted than constitutional recognition. Having evaluated a range of possible legislative recognition options, it is argued that the most preferable form of recognition is recognition of an independent human right to a healthy environment in the context of a broader statutory bill of rights based on the dialogue model at both the Commonwealth and state/territory levels. It is argued that recognition of the right through this form of recognition may be a potentially useful, albeit limited, tool for environmental protection in Australia.

The limitations of the right as a tool for environmental protection are outlined, in particular the limitations associated with the form of recognition, the nature and content of the right, and the social and political context in which it must operate. It is concluded that whilst the right may have a potentially useful operation as a tool for environmental protection in Australia, its general utility should not be overstated. This is due partly to the inherently limited nature of the right as a tool for environmental protection, and partly to the limited scope of the thesis research. It is explained that future research is necessary to ascertain further potential benefits associated with recognition of the right in Australia, including consideration of the right's potential operation in specific environmental protection contexts.

However, it is explained that this cannot occur until the normative content of the right is authoritatively outlined, as only then will it be possible to consider the potential impact of the right at a more specific level. It is hoped that the research will contribute to a national discussion regarding the adequacy of traditional legal and regulatory approaches to environmental protection, and to a broader international discussion concerning the utility of rights-based approaches to environmental protection.

Acknowledgments

This thesis is dedicated to my family, who have provided me with unwavering support throughout my candidature.

I extend my sincere gratitude to my supervisors, Dr Peter Lawrence, Mr Lynden Griggs and Mr Michael Stokes, for their time, feedback and advice.

I also thank the Faculty of Law and the Graduate Research Office for their generosity in awarding me an Elite Research Scholarship to complete this research.

In particular, I gratefully thank the Dean of the Faculty of Law, Prof Margaret Otlowski, and Graduate Research Co-ordinator, Dr Jeremy Prichard.

Acronyms and Abbreviations

ACT	Australian Capital Territory
ANEDO	Australian Network of Environmental Defender's Offices
Arnold	*Arnold v Minister Administering the Water Management Act 2000 (No 6)* [2013] NSWLEC 73
Berlin Rules	*Berlin Rules on Water Resources*
CELDF	Community Environmental Legal Defence Fund
COAG	Council of Australian Governments
CP rights	Civil and political rights
CSD	Commission on Sustainable Development
Draft Principles	*Draft Principles on Human Rights and the Environment*
ESC rights	Economic, social and cultural rights
EDO	Environmental Defenders Office
EPA	Environment Protection Authority
EPBC Act (Cth)	*Environment Protection and Biodiversity Conservation Act 1999*
ESD	Ecologically sustainable development
Fearnside	*R v David Arthur Fearnside* [2009] ACTA 3 (24 February 2009)
HRTHE	Human right to a healthy environment
ICCPR	*International Covenant on Civil and Political Rights*
ICESCR	*International Covenant on Economic, Social and Cultural Rights*
ICM	*ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140
MDBA	Murray-Darling Basin Authority
MDB	Murray-Darling Basin
MNES	Matters of national environmental significance
Momcilovic	*Momcilovic v The Queen* (2011) 245 CLR 1
NAPSWQ	National Action Plan for Salinity and Water Quality
NEPM	National Environment Protection Measure
NGOs	Non-government organisations
NMP	Nutrient management plan
NPI	National Pollutant Inventory

NSW	New South Wales
NT	Northern Territory
NWC	National Water Commission
NWI	National Water Initiative
NWQMS	National Water Quality Management Strategy
NZ	New Zealand
QLD	Queensland
SDG	Sustainable Development Goal
SDL	Sustainable Diversion Limit
Tasmanian Dam Case	*Commonwealth v Tasmania* (1983) 158 CLR 1
TLRI	Tasmanian Law Reform Institute
UDHR	*Universal Declaration of Human Rights*
UN	United Nations
UNCESCR	United Nations Committee on Economic, Social and Cultural Rights
UNHRC	United Nations Human Rights Committee
US	United States of America
VIC	Victoria
Water Act	*Water Act 2007* (Cth)
Water Quality Guidelines	Australian and New Zealand Guidelines for Fresh and Marine Water Quality
XYZ	*XYZ v Commonwealth* (2006) 227 CLR 532

Table of Contents

Chapter One
Introduction

1.1 Introduction

Since the creation of the *Universal Declaration of Human Rights* after the Second World War, 'rights talk' has pervaded moral, political and legal discourse as the universal language in which the basic freedoms and duties of humanity should be expressed. The Declaration sought to recognise and protect the 'inherent dignity' and 'equal and inalienable rights of all members of the human family', as a reaction to the devastation experienced over the course of the World Wars.[1] In its willingness to recognise the importance of adherence to the rule of law, the achievement of equality and the 'dignity and worth of the human person' it was a landmark agreement.[2]

However, the drafters never intended to comprehensively elucidate the entire body of rights possessed by members of the human species. Of the thirty articles and preamble that make up the Declaration, nowhere is a right to a healthy environment directly mentioned. Although the Declaration recognises the right to life and the right to a standard of living adequate for health, it fails to explicitly recognise a fundamental pre-condition for the achievement of these rights, namely, a healthy natural environment. In light of this, it is unsurprising that the relationship between human rights and the environment has increasingly attracted attention in both the human rights and environmental law communities.[1]

Initially, this interest was of a largely academic nature, inviting consideration of the nature of the relationship between human rights law and environmental protection, as well as the possible existence of environmental rights, such as the human right to a healthy environment. However, as noted by Boyd, in recent years the discussion has begun to transcend the realms of theory into a consideration of whether, and to what extent, human rights can be practically utilised as a means of achieving environmental protection.[2] At the international, national and

[1] *Universal Declaration of Human Rights*, GA res. 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) 71.
[2] Ibid.
[1] See generally Donald K Anton and Dinah L Shelton, *Environmental Protection and Human Rights* (Cambridge University Press, 2011).
[2] David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (UBC Press, 2012), 3.

local levels, human rights approaches to environmental protection are increasingly being implemented, raising important questions about their impact on legal systems and their ability to assist in addressing the global decline in environmental health. As one of the nations which has thus far eschewed formal recognition of environmental rights, Australia provides an ideal case study to explore the potential impact of environmental rights recognition upon an already advanced system of environmental protection and natural resources management. Australia holds the (perhaps dubious) distinction of being the only democratic nation without a national bill of rights.[3] It is therefore unsurprising to note that Australia is one of only fifteen nations that does 'not yet recognize that their citizens possess a legal right to a healthy environment'.[4] Similarly, Australia is yet to recognise the human right to water, or the rights of non-human animals and environmental entities.[5] Accordingly, an important question to consider is why Australia has failed to embrace rights-based approaches to environmental protection and management, and whether and to what extent these approaches may be of some utility in the Australian context. Countries around the world have begun to integrate versions of the human right to a healthy environment into their constitutions, laws, policies and political rhetoric, and Australia is well placed to learn from this experience in order to make an informed decision about whether it should join the 'environmental rights revolution'. It is integral that this decision is informed by considered analysis and discussion of the rationale, necessity and desirability of legal recognition.

The aim of this thesis is to consider the potential utility of one particular rights-based approach within the Australian environmental protection context. The thesis seeks to explore whether legal recognition of the human right to a healthy environment at the international level and at the Australian domestic level may be capable of offering benefits for environmental protection (hereafter 'the right' or 'HRTHE'). As it is not possible to consider the right's potential impact on all aspects of environmental protection in Australia, in order to explore the research question in a specific environmental protection context, the thesis conducts a case study on the right's potential impact on the protection and management of water resources, particularly in the Murray-Darling Basin ('MDB').

[3] Australian Human Rights Commission, *How are Human Rights Protected in Australian Law?* <https://www.humanrights.gov.au/how-are-human-rights-protected-australian-law>.
[4] Boyd, above n 2, 48.
[5] See generally Meg Good, 'Implementing the Human Right to Water in Australia' (2011) 30 (2) *University of Tasmania Law Review* 107.

If the human right to a healthy environment receives legal recognition in Australia, water management is one of the main areas it may affect. Accordingly, water management has been selected as the case study for assessing the potential impacts of legal recognition on environmental protection. As the world's driest inhabited continent, one of the key environmental challenges facing Australia is the management of the nation's precious water resources. Questions about who and what should be able to use, control and impact on water will only increase in importance over the next fifty years as Australia faces the dual challenges of global warming and global population growth. At present, the laws and policies which govern Australian water management do not incorporate an explicitly rights-based approach. Rather, they are grounded in the theory and practice of property law, often characterising rights to water in proprietary terms.[6] Indeed, one of the major reforms in water law over the past few decades was the facilitation of trade in water rights, enabled by the separation of land and water title.[7]

For the above reasons, exploring the potential implications of legal recognition of the right on Australia's legal and policy framework for protecting water resources may help to provide a useful indication of how recognition of the right may impact on environmental protection more generally. The MDB has been selected as a specific case study area within this context, as it is Australia's largest river system which has attracted significant scholarly and political debate. As the focus of Australia's principal water law and policy reforms, the Basin has been subject to a range of environmental protection approaches. Accordingly, it is useful to consider how alternative environmental protection approaches may operate within this existing framework.

The thesis ultimately concludes that legal recognition of the HRTHE in Australia may offer potential benefits for environmental protection. Characterising environmental protection as a fundamental human interest deserving of protection by a right may help strengthen calls for improved environmental protection, and the intergenerational aspects of the right may encourage focus on consideration of the impacts of current practices on the enjoyment of the right by future generations. The thesis concludes that although the right is an inherently limited tool for environmental protection, legal recognition may increase consideration and

[6] See generally, Michael McKenzie, 'Water Rights in NSW: Properly Property?' (2009) 31 *Sydney Law Review* 443.
[7] Ibid 444.

prioritisation of environmental protection considerations in government decision-making and increase avenues to challenge government decision-making.

1.2 Research question

This thesis aims to address the following overarching research question:

> Could international and/or domestic legal recognition of the human right to a healthy environment offer any potential benefits for environmental protection in Australia?

In order to provide a response to the key aspects of the question, the thesis has been designed to answer the following sub-questions:

1. *Legal recognition*

   How could the human right to a healthy environment be recognised at the international level and in Australia's domestic laws, and what are the most preferable forms of recognition?

2. *Benefits for environmental protection*

   What are some general potential benefits for Australian environmental protection associated with international and domestic legal recognition of the right? How could these benefits for environmental protection be realised through the identified preferable forms of legal recognition? To demonstrate the potential realisation of these benefits in a specific environmental protection context, how could these benefits be realised in the Australian water management context?

As the research question seeks to explore the extent to which legal recognition of the right may offer 'benefits' for environmental protection in Australia, it is necessary to define what may be conceived of as a 'benefit'. For the purposes of this thesis, a benefit for environmental protection is defined as a consequence of legal recognition which assists in the achievement of ecologically sustainable development ('ESD'), and addresses challenges currently facing the pursuit of environmental protection (elaborated in Chapter Two).

1.3 Contribution to the literature

Three main bodies of literature were reviewed in order to scope the thesis question; the literature addressing human rights and the environment, Australian environmental law, and Australian water law, policy and management. Firstly, the 'human rights and the environment' literature was considered. Due to the thesis' focus, particular consideration was devoted to the scholarship pertaining to the human right to a healthy environment. It was identified that whilst significant theoretical discussion has been devoted to the concept, there is a 'gap' in the literature in relation to analysis of the practical implementation of environmental rights-based approaches.[8] A corresponding gap was identified in the Australian environmental law literature, which contains minimal discussion of the potential application of rights-based approaches to environmental protection in the Australian context. Similarly, relatively little scholarly attention has focussed on the application of rights-based approaches to environmental protection in the specific context of Australian water resources law and management.

Accordingly, the thesis is situated within various bodies of legal scholarship, contributing to three main areas for further development. The first area for further research concerns practical implementation of rights-based approaches to environmental protection. Boyd has outlined a number of 'priorities for future research' in this regard.[9] In particular, he has called for research exploring the reasons why common law legal systems have been more reluctant to recognise the HRTHE as compared to civil law legal systems.[10] He also argues that an 'investigation into the extent and effectiveness of the right to a healthy environment when recognized in subnational constitutions or regular legislation would be a useful addition to the field.'[11] This thesis attempts to contribute to both of these priority research areas, as it explores the possible factors contributing to Australia's reluctance to join the environmental rights revolution (a common law legal system), and evaluates the potential impact of legislative recognition of the right.

The second area for further research concerns the application of rights-based approaches to environmental protection in Australia. The research aims to contribute to this gap in the

[8] Amanda Cahill-Ripley, *The Human Right to Water and its Application in the Occupied Palestinian Territories* (Routledge, 2011) 3.
[9] Boyd, above n 2, 286.
[10] Ibid 288.
[11] Ibid 290.

literature by providing an evaluation of the potential utility of one particular rights-based approach for environmental protection in the Australian context. The thesis aims to identify whether legal recognition of the human right to a healthy environment in Australia may potentially be capable of providing some general benefits for environmental protection. Only a limited number of commentators have sought to directly consider the question of whether Australia should consider recognition of environmental rights as a tool for environmental protection.[12] Accordingly, this thesis seeks to make a useful contribution to the existing literature by engaging in an evaluation of how the right to a healthy environment may be practically implemented in Australia. Finally, the thesis contributes to the identified gap in the literature relating to the application of rights-based approaches to environmental protection in the Australian water management context. At present, the water law and policy literature has devoted minimal attention to the possible benefits that rights-based approaches may have to offer water management.

It is hoped that overall the thesis will contribute to a national discussion regarding the adequacy of traditional legal and regulatory approaches for achieving adequate environmental protection, and to a broader international discussion concerning the utility of rights-based approaches to environmental protection. This broader discussion contributes to a growing movement and body of literature discussing the need to reform environmental law in order to enable it to respond to inherent and fundamental systemic challenges facing environmental protection.[13] The capacity of the right to assist in improving environmental protection in light of these challenges is addressed in Chapter Seven.

[12] For example, see Rowena Cantley-Smith, 'A Human Right to a Healthy Environment' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters, 2013) 447.
[13] For a summary of some key debates in the area, see Paul Anderson, *Reforming Law and Economy for a Sustainable Earth: Critical Thought for Turbulent Times* (Routledge, 2015).

1.4 Research methodology and process

1.4.1 Research objectives and choice of methodology

The thesis adopts a theoretical research approach, involving the consultation of relevant academic literature and other relevant published sources. Whilst the possibility of engaging in qualitative research involving the consultation of experts in the field was considered, it was decided that such an approach may be more appropriate for future research. The first part of the research question is well suited to a theoretical research approach, as it requires discussion of possible forms of legal recognition of the HRTHE at the international level and under Australian domestic law. This is an enquiry which can be comprehensively considered without recourse to qualitative research. The second aspect of the research question addresses the potential benefits for Australian environmental protection associated with international and domestic legal recognition of the right. Various possible approaches to this aspect of the question were considered. It was decided that given the lack of authoritative articulation of the scope and content of the right at the international level, it would not be possible to ascertain how a specific formulation of the right could impact on environmental protection in Australia. Rather, the research sought to identify some general potential benefits associated with legal recognition, in order to ascertain whether they could possibly be realised through the identified preferable forms of legal recognition.

The thesis explores the potential benefits of environmental protection associated with both international legal recognition and domestic legal recognition of the right. For international legal recognition of the right, a number of possible consequences of recognition were evaluated to ascertain whether they could constitute 'benefits' for environmental protection according to the definition adopted. For domestic legal recognition of the right, as it is not possible for the thesis to consider all of the potential benefits for environmental protection, the thesis was restricted to consideration of whether domestic legal recognition is capable of realising a set of identified potential benefits. The following set of potential environmental protection benefits were selected:

1. Emphasis on the fundamental importance of the interrelationship between human health and wellbeing and the state of the natural environment;
2. Stronger basis for environmental laws and policies;
3. Increased prioritisation of environmental protection considerations in government decision-making;
4. Safeguards against environmental protection rollbacks;

5. Safety net by filling gaps in environmental legislation;
6. Avenues to bring legal actions in the interests of environmental protection;
7. Inform environmental quality standards.

The rationale for the selection of these benefits was twofold. Firstly, a number of these benefits have been associated with domestic legal recognition of the right in other jurisdictions. The selected benefits have been drawn from Boyd's research, which identified numerous benefits associated with domestic legal recognition of the right across the world.[14] Accordingly, it is relevant to consider whether Australia may be able to enjoy a similar experience. Secondly, it is argued that these benefits address key aspects of the goals of ESD, and assist in addressing some of the key challenges facing Australian environmental protection. [15] Chapters Six and Seven consider how these potential benefits may be realised in the Australian context, under different forms of legal recognition. As it would be impossible to comprehensively discuss the potential realisation of these benefits in all areas of environmental protection in Australia, the research focussed specifically on their realisation in one environmental protection context. The Australian water management context was selected in recognition of the fact that protection of water resources is one of the key environmental management areas that may be impacted by adoption of a rights-based approach to environmental protection.

To further scope the enquiry, water management within the Murray-Darling Basin was selected as the focus for the case study in recognition of the significant literature addressing water management and environmental protection in the Basin and the significance of the Basin as Australia's largest and most utilised river system. It is acknowledged that the choice of research methodology can have a significant influence on the ultimate conclusions of the research. It would have been possible to select a different set of potential benefits, a different set of legal recognition options, and to assess the potential realisation of these benefits through the identified forms of legal recognition in different environmental protection

[14] Boyd's research has confirmed the realisation of the following benefits for environmental protection associated with domestic constitutional recognition of the right: stronger environmental laws, creation of a safety net to close gaps in environmental law, the prevention of rollbacks on environmental protection, improved implementation and enforcement of environmental laws and policies, promotion of environmental justice, increased public involvement in environmental governance, increased governmental accountability, the creation of a level playing field with social and economic rights, and improved environmental education: Boyd, above n 2, 27-32.

[15] The rationale is explained in further depth in Chapter Five.

contexts. For this reason, it is recognised that the scope of the research is necessarily limited (discussed further at 1.5).

1.4.2 Research process

In order to respond to the overarching research question, a number of sub-questions were developed to guide the analysis. The thesis structure is guided by six sets of sub-questions, with each substantive chapter (excluding the introduction and conclusion) designed to address one question set. The following section details the research process, by outlining the rationale for each of these sets of sub-questions, and explaining the research method adopted.

Chapter Two – Approaches to Environmental Protection in Australia

Research sub-questions:

1. What are the current approaches to environmental protection in Australia?
2. Have these approaches been successful in achieving ecologically sustainable development?
3. What are some of the key environmental protection challenges facing Australia?
4. What approaches to environmental protection have been adopted in the Murray-Darling Basin water management context, and how effective have they been?

Rationale and method:

The first set of sub-questions aim to identify the current approaches to environmental protection in Australia, in order to provide context for the subsequent discussion of the adoption of possible rights-based approaches. By defining the concept of ecologically sustainable development, and identifying various environmental challenges facing environmental protection in Australia it also assists in elucidating a key aspect of the research question. As explained above, the research question seeks to determine whether legal recognition of the right may offer some potential benefits for Australian environmental protection. Benefits have been defined to mean consequences which assist in the achievement of ecologically sustainable development, and address challenges currently facing the pursuit of environmental protection. As the thesis utilises water resources management as a case study to explore the broader research question, the questions seek to determine the current approach to environmental protection in the water resources context, and to ascertain the general effectiveness of this approach. As the right's potential impact on

environmental protection in this context is considered throughout the thesis, it is necessary to provide this context at the outset.

In conducting this research, two main bodies of literature were consulted. Firstly, the literature pertaining to environmental regulation in Australia was considered, in order to ascertain the nature of current regulatory models, and their effectiveness for achieving environmental protection. Primarily, reliance was placed on scholarly sources and the opinions of environmental law experts. Secondly, the literature pertaining to Australian water resources law and policy was consulted. As this is a broad and complex area of the law, the research was limited to consideration of the literature addressing sustainability in water management, and water pollution and water quality regulation in the MDB region. A range of sources were relied upon, including scholarly sources, government sources, Australian case law, and water management and environmental protection legislation.

Chapter Three – The Environmental Rights Revolution and Australia

Research sub-questions:

1. What is the environmental rights revolution, and why has it emerged?
2. What are the types of environmental rights which have been recognised?
3. Has Australia embraced the concept of environmental rights?
4. If not, what are the possible factors explaining Australia's reluctance?

Rationale and method:

The second set of sub-questions have been designed to provide context to the discussion of the adoption of possible rights-based approaches. They seek to understand the factors explaining Australia's reluctance to embrace rights-based approaches to date. The questions also seek to understand why other countries have adopted rights-based approaches, and whether any of these motivating factors might also be applicable in the Australian context. The overall aim of the chapter is to determine whether there are legitimate and significant reasons explaining Australia's refusal to join the environmental rights revolution, which might mitigate against adoption of a rights-based approach. To answer these questions, the global scholarship addressing environmental rights was consulted. This included consideration not only of the literature addressing human rights approaches to environmental protection, but also extended to consideration of earth jurisprudence and wild law scholarship.

Chapter Four – International Legal Recognition of the Human Right to a Healthy Environment

Research sub-questions:

1. Can the human right to a healthy environment be established as a moral right?
2. What is the legal status of the right under international law?
3. What is the scope and content of the right, and what obligations does it impose on states?
4. How can compliance with the obligations imposed by the right be assessed at the international level?

Rationale and method:

The third set of sub-questions have been designed to ascertain the legal source and status of the right at international law, in order to identify the possible scope and content of the right. Understanding the potential content of the right is crucial, as it informs subsequent discussion of the potential benefits associated with legal recognition of the right at both the international and domestic levels. The international legal status of the right also has implications for the legislative options available to Australia, explored in later chapters.

To answer the questions posed in this chapter, the literature addressing three main subject areas was addressed, namely, human rights theory, human rights and the environment scholarship, and international human rights law. Within each of these bodies of scholarship, particular focus was placed on literature addressing the human right to a healthy environment. In addition to scholarly sources, particular reliance was placed on guidance provided by the United Nations Committee on Economic, Social and Cultural Rights regarding the content of ESC rights recognised under the Covenant. The literature addressing the development and use of human rights indicators was also consulted in order to determine how state compliance with the obligations imposed by the right may be evaluated.

Chapter Five – Potential Benefits of Legal Recognition of the Human Right to a Healthy Environment for Australian Environmental Protection

Research sub-questions:

1. What are some potential benefits for environmental protection in Australia associated with international legal recognition of the human right to a healthy environment?
2. How could the human right to a healthy environment be recognised under Australia's domestic laws?

3. What potential benefits for environmental protection may be associated with domestic legal recognition of the right?
4. What are the possible limitations of both forms of recognition?

Rationale and method:

The fourth set of sub-questions are designed to ascertain how international and domestic legal recognition of the right may impact on domestic environmental protection in Australia. If the right is recognised as an implied right under the ICESCR, certain obligations would be imposed on Australia. The aim of these questions is to determine whether the imposition of obligations on the government and the conferral of the right on Australian citizens could possibly benefit environmental protection. This question is explored both generally, and specifically in relation to the potential impact on water resources management. As there may possibly be a wide range of potential benefits offered by the right, this chapter seeks to limit the scope of the thesis analysis by outlining a set of potential benefits for environmental protection which have been associated with domestic legal recognition of the right in other jurisdictions. Subsequent chapters then evaluate the extent to which these potential benefits may be realised under different forms of domestic legal recognition.

Aspects of four bodies of literature were consulted for this chapter; international human rights law, international environmental law, and Australian human rights law. The set of benefits for environmental protection associated with domestic legal recognition of the right were drawn from the research of David R Boyd, who has conducted the most recent and comprehensive study of the impacts of domestic recognition of the human right to a healthy environment in jurisdictions around the world.

Chapter Six – Constitutional Recognition of the Human Right to a Healthy Environment in Australia

Research sub-questions:

1. Is it possible to recognise the human right to a healthy environment under the *Australian Constitution*?
2. If so, what is the most preferable form of recognition?
3. Can the potential benefits for environmental protection identified for domestic legal recognition be realised through the preferable form of constitutional recognition?
4. How could these benefits be realised in the Australian water management context?
5. What are the potential limitations?

Rationale and method:

The fifth set of sub-questions are designed to evaluate whether constitutional recognition of the right is a possible and desirable form of legal recognition of the right in Australia. As one of the research sub-questions seeks to identify the most preferable form of legal recognition of the right, it is necessary to consider the main legal recognition options, and their associated advantages and limitations. The questions aim to ascertain whether the potential benefits for environmental protection identified in the previous chapter could be realised through the form of constitutional recognition identified as the most preferable. This was explored both generally, and specifically in relation to the potential impact on the case study context of water resources management.

For this chapter, five areas of scholarship were considered. Namely, the literature addressing Australian constitutional law, US constitutional law (insofar as it was relevant as a means of comparison), constitutional environmental rights, Australian environmental law, and Australian water law. As Australia has a unique constitutional context, the literature pertaining to the realisation of the right in other constitutional contexts was not relied upon. Rather, the chapter focussed on ascertaining the possible consequences of constitutional recognition in Australia, and their potential impacts on environmental protection.

Chapter Seven – Legislative Recognition of the Human Right to a Healthy Environment in Australia

Research sub-questions:

1. Is it possible to provide legislative recognition of the human right to a healthy environment in Australia?
2. If so, what is the most preferable form of legislative recognition?
3. Can the potential benefits for environmental protection identified for domestic legal recognition be realised through the preferable form of legislative recognition?
4. How could these benefits be realised in the Australian water management context?
5. What are the potential limitations?

Rationale and method:

The sixth set of sub-questions are designed to explore whether legislative recognition of the right is a possible and desirable form of legal recognition of the right in Australia. Exploring the potential legislative recognition options is important, if it is concluded that constitutional

recognition is not the most preferable form of recognition. The questions seek to identify the most preferable form of legislative recognition, and to discuss whether the potential benefits for environmental protection associated with domestic recognition identified in Chapter Five can be realised through this form of recognition. This is explored both generally, and specifically in relation to water resources management.

For this chapter, five areas of literature were consulted. Namely, Australian constitutional law (for the consideration of legislative power), Australian human rights law, Australian environmental law, Australian water law, and Australian administrative law. As with the constitutional law chapter, rather than placing reliance on the experience of other jurisdictions with legislative recognition of the right, the chapter focusses on ascertaining the possible consequences of legislative recognition in Australia, and how these consequences could help realise the potential benefits for environmental protection identified. Illustrations of how these benefits may be realised in the case study context of water management are utilised to demonstrate how the general benefits for environmental protection may be realised in a specific context. A comprehensive analysis of the potential impact of the right in the case study context is not conducted, as it is neither necessary nor possible to do so. It is unnecessary in terms of responding to the overarching research question, and not possible due to the unknown content of the right under the Covenant.

1.5 Limitations of the research

The thesis is necessarily limited in its scope. It does not seek to demonstrate that the human right to a healthy environment offers a panacea for the problems facing environmental protection. Rather, it aims to test the limited hypothesis that specific forms of legal recognition of the human right to a healthy environment may be capable of offering some potential benefits for environmental protection in Australia. In order to scope the enquiry, the full suite of possible environmental protection benefits associated with various different forms of recognition have not been explored. The potential benefits with respect to international legal recognition have been restricted to consideration of three main possible benefits. Similarly, for domestic legal recognition, the analysis has been limited to consideration of the potential realisation of a specific set of possible benefits. The conclusion that these possible consequences of legal recognition may constitute benefits has been informed by a particular understanding of the goals of environmental protection and the challenges facing environmental regulation, which are both subjects of debate. Furthermore, as the thesis has utilised a case study of the possible realisation of these benefits in the water management context, further research will be required to more fully explore the potential implications of legal recognition of the right for the management of other critical environmental issues. For instance, it may be useful for future research to consider how the proposed form of legislative recognition may operate as a beneficial tool for environmental protection in other contexts, such as biodiversity conservation and climate change.

As the content of the right has not been authoritatively outlined at the international level, it is not yet possible to ascertain more specific potential benefits associated with legal recognition. Accordingly, the benefits for environmental protection have been stated at a degree of generality which allows for differing interpretations of the content of the right. Exploration of these potential benefits in the case study context is accordingly limited to illustrations of how these potential general benefits may be realised in a specific environmental protection context. It is not a comprehensive exploration of the potential impacts of legal recognition of the right on water resources management in Australia. Accordingly, the thesis' conclusions have been correspondingly restricted in scope. The research is only capable of providing a response to the overarching research question. It cannot be used as authority for the proposition that legal recognition of the HRTHE is an unequivocally useful tool for environmental protection in all contexts. It can only be utilised

as a starting point for discussion regarding the potential utility of one particular form of legal recognition of the right in Australia.

1.6 Thesis structure

Chapter One introduces the aims of the thesis, explains the research process, and outlines how the thesis is intended to contribute to gaps in the existing literature.

Chapter Two outlines the current approaches to environmental protection in Australia, and highlights some of the key challenges facing environmental protection. In order to provide context for the thesis' case study, the chapter outlines the approach to environmental protection in the Australian water resources management context. It is concluded that as Australia continues to face numerous environmental protection challenges, it is important to consider additional approaches, such as rights-based approaches.

Chapter Three attempts to explain why Australia has thus far refused to join the environmental rights revolution, and offers a number of potential explanations for Australia's reluctance. It argues that Australia's failure to adopt a rights-based approach can be attributed to a number of factors, including, a perception that existing approaches are adequate, general hesitation to provide legal recognition for broad rights declarations and a lack of environmental rights advocacy. It argues that the perception that environmental rights may be at odds with the nature of Australia's common law legal system is flawed for various reasons. In particular, it contends that concerns relating to the politicisation of the judiciary, opening the 'floodgates' to litigation, and the creation of unintended and undesirable outcomes can be challenged on a number of grounds, and should not be viewed as determinative arguments against recognition. The chapter concludes that although the adoption of a rights-based approach would constitute a significant departure from the status quo, consideration of domestic legal recognition of the right is warranted in light of the positive experience in other jurisdictions and the need to identify new tools for improving environmental protection.

Chapter Four outlines the possible sources of the right at international law. It argues that although the right is yet to receive express recognition under a binding international treaty, the right may be viewed as an implied right under the ICESCR. Although this interpretation has not been accepted by the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR), it is conceivable that the right will receive international legal recognition in the future. In order to outline the potential scope and content of the right to a

healthy environment under the ICESCR, it explores the approach to interpretation of a related right (the human right to water) by the UNCESCR and applies this approach to the interpretation of the HRTHE. It argues that although it is not yet possible to authoritatively determine the right's content, through consideration of the possible content of the right it is possible to identify a number of potential obligations imposed by recognition of the right. The chapter then considers how compliance with these obligations could be assessed at the international level. However, it concludes that due to the absence of authoritative guidance on the content of the right, it is not yet possible to develop human rights indicators to measure progress towards realisation of the right.

Chapter Five considers the potential benefits for environmental protection in Australia associated with international and domestic legal recognition of the right. The options for international legal recognition of the right are canvassed, concluding that the most likely form of recognition is as an implied right under the ICESCR. It then discusses whether recognition of the right at the international level may assist in improving environmental protection at the domestic level in Australia. It concludes that there are various potential benefits associated with international legal recognition, including increasing international scrutiny, and facilitating comparisons against international standards. The possible realisation of these benefits in the case study context of water management is then considered, and a number of limitations of international legal recognition of the right for environmental protection are identified. The analysis then turns to consideration of the potential benefits for environmental protection associated with domestic legal recognition of the right.

As the thesis defines a 'benefit' for environmental protection in Australia as a legal consequence of recognition which assists in the achievement of ESD and addresses Australia's environmental protection problems, the chapter considers whether realisation of a number of the 'benefits' for environmental protection enjoyed in other jurisdictions would constitute benefits in Australia according to the definition adopted. Having concluded that these legal consequences of recognition could constitute benefits in the Australian context, the chapter explains that the set of identified benefits will be utilised to guide the analysis of the potential benefits of constitutional and legislative recognition in subsequent chapters (Chapter Six and Chapter Seven).

Chapter Six considers options for constitutional recognition of the right at the Commonwealth and state/territory levels. Through consideration of the recognition options, it concludes that the most preferable form of recognition is recognition of the right under a constitutionally entrenched bill of rights at both levels of government. It concludes that although there are various potential benefits for environmental protection associated with this form of constitutional recognition, recognition of a constitutionally entrenched bill of rights is unlikely in the current political climate. For this reason, options for legislative recognition are considered in Chapter Seven.

Chapter Seven considers the options for legislative recognition of the right, and argues that recognising the right within federal/state/territory bills of rights legislation based on the dialogue model is the most preferable form of domestic legal recognition. The analysis then turns to consideration of whether the proposed form of legislative recognition is capable of realising the set of potential benefits for environmental protection outlined in Chapter Five. It concludes that it is possible that these benefits could be realised to varying extents, including increased prioritisation of environmental protection considerations in government decision-making and the facilitation of further avenues to challenge government decision-making. However, the chapter cautions that whilst a legislatively recognised right would likely prove to be neither dangerous nor redundant in its operation, it is a limited tool for assisting environmental protection.

Chapter Eight concludes that whilst there are various criticisms and limitations associated with legal recognition of the right, these issues do not outweigh the potential benefits recognition of the right may have to offer environmental protection in Australia. However, it cautions against overstating the general utility of the right, given the limited scope of the thesis, the significant and broad ranging nature of the challenges facing environmental protection, and the limited operation of the right. The chapter explains how the research contributes to the identified gaps in the literature, and concludes by highlighting potential areas for future research.

Chapter Two
Approaches to Environmental Protection in Australia

What are the current approaches to environmental protection in Australia? Have these approaches been successful in achieving ecologically sustainable development? What are some of the key environmental protection challenges facing Australia? What approaches to environmental protection have been adopted in the Murray-Darling Basin water management context, and how effective have they been?

2.1 Introduction

The aim of this thesis is to ascertain the potential utility of a rights-based approach to environmental protection for achieving improved environmental protection in Australia. It was explained in Chapter One that for the purposes of the analysis 'benefits' for environmental protection are defined to mean consequences of recognition which assist in the achievement of ecologically sustainable development (ESD), and address challenges currently facing the pursuit of environmental protection. Accordingly, this chapter first defines the concept of ESD, and evaluates the extent to which ESD is currently implemented in Australian law and policy. It then outlines the nature of current approaches to environmental protection in Australia, and identifies a number of challenges facing environmental protection. It explains that over the past few decades, traditional regulatory approaches have been supplemented by newer regulatory models, including market-based approaches which seek to provide economic incentives for improved environmental protection. The chapter then explores in greater detail the approach to environmental protection in a specific environmental protection context, namely, the approach to water management in Australia's largest river system (the Murray-Darling Basin).

As water management has been selected as the case study to explore the thesis' broader overarching research question, providing this context is necessary to ground subsequent discussions of the possible impact of a rights-based approach on the existing system. The chapter concludes that given the failure to fully operationalise the principles of ESD, and the various challenges continuing to face environmental protection in Australia, an exploration of the potential utility of alternative approaches may be useful. Accordingly, Chapter Three explores the possibility of adopting rights-based approaches to environmental protection in Australia.

2.2 Ecologically sustainable development

As explained in Chapter One, for the purposes of this thesis 'benefits' for environmental protection are defined to mean consequences which assist in the achievement of ecologically sustainable development ('ESD'), and/or address challenges currently facing the pursuit of environmental protection. This section addresses the meaning of ecologically sustainable development, and evaluates the extent to which ESD is currently implemented in Australian law and policy.

2.2.1 Definition of ESD

As noted by Fisher, although the concept of ESD is not necessarily 'universally accepted, clear in concept or enforceable in practice' it is 'in one form or another…the fulcrum around which environmental law is evolving'.[1] Australia's *National Strategy for Ecologically Sustainable Development*, defines ESD as 'using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased.'[2] Utilising this definition, McGrath notes that ESD therefore 'involves two aspects: a threshold test and a balancing exercise'.[3] The threshold test requires that the ''ecological processes on which life depends' must be protected'.[4] He cites the 'water cycle' as one of these crucial ecological processes.[5] The balancing exercise refers to the need to increase the 'total quality of life' at present and into the future. McGrath argues that this 'means more than simply development which can be continued indefinitely and it is more than balancing economic, social and environmental concerns…'[6] He suggests that the principles of ESD can be used to determine how to achieve this balance.[7]

The guiding principles outlined in the *Strategy* were designed to help governments to determine how to achieve ESD. The principles are as follows:

- decision making processes should effectively integrate both long and short-term economic, environmental, social and equity considerations
- where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation

[1] D Fisher quoted in Chris McGrath, *Does Environmental Law Work? How to Evaluate the Effectiveness of an Environmental Legal System* (Lambert Academic Publishing, 2010) 55.
[2] Department of the Environment (Cth), *National Strategy for Ecologically Sustainable Development 1992* <http://www.environment.gov.au/about-us/esd/publications/national-esd-strategy>.
[3] McGrath, above n 1, 57.
[4] Ibid.
[5] Ibid, 58.
[6] Ibid, 59.
[7] Ibid.

- the global dimension of environmental impacts of actions and policies should be recognised and considered
- the need to develop a strong, growing and diversified economy which can enhance the capacity for environmental protection should be recognised
- the need to maintain and enhance international competitiveness in an environmentally sound manner should be recognised
- cost effective and flexible policy instruments should be adopted, such as improved valuation, pricing and incentive mechanisms
- decisions and actions should provide for broad community involvement on issues which affect them.[8]

In the *Intergovernmental Agreement on the Environment*, the parties agreed that ESD 'should be used by all levels of Government in the assessment of natural resources, land use decisions and approval processes'.[9] As explained by Godden and Peel, the aim of the ESD principles outlined in the *Strategy* was not to stipulate 'precise environmental standards'.[10] Rather, it was to 'guide the development of specific environmental rules and to provide a framework for making individual decisions that balance environmental and development considerations'.[11]

2.2.2 Integration of ESD into law and policy

The extent to which the principles of ESD have been adequately integrated into environmental policy, planning and approval processes is a question of debate.[12] Macintosh argues that ESD as a 'meta-objective' of Australian environmental protection law and policy has not had a significant impact on Australian environmental institutions.[13] Whilst it is difficult to ascertain the substantive impact of the concept, it has certainly become a crucial principle in Australian environmental policy which is implemented to varying degrees in law and policy at all levels of government.

The Commonwealth's premier piece of environmental legislation, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) outlines five principles of ESD.[14]

[8] Department of the Environment (Cth), above n 2.
[9] Department of the Environment (Cth), *Intergovernmental Agreement on the Environment 1992* [Schedule 2] <https://www.environment.gov.au/about-us/esd/publications/intergovernmental-agreement>.
[10] Lee Godden and Jacqueline Peel, *Environmental Law: Scientific, Policy and Regulatory Dimensions* (Oxford University Press, 2009), 136.
[11] Ibid.
[12] See generally the recent special edition (Vol 22 (1)) of the *Australasian Journal of Environmental Management* on the topic. In particular, Giorel Curran & Robyn Hollander, '25 Years of Ecologically Sustainable Development in Australia: Paradigm Shift or Business as Usual?' (2015) 22 (1) *Australasian Journal of Environmental Management* 2.
[13] Andrew Macintosh, 'The Impact of ESD on Australia's Environmental Institutions' (2015) 22 (1) *Australasian Journal of Environmental Management* 33, 34.
[14] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3A:

These principles include the precautionary principle,[15] and the principle of inter-generational equity. [16] ESD principles are also incorporated into state/territory environmental management and protection legislation.[17] However, as Godden and Peel note, overall there has been 'limited implementation of ESD in environmental legislation' in Australia.[18] Whilst the concept has received significant recognition at the policy level, there is still significant room for improvement in terms of legislative recognition and operationalisation of the principles of ESD in government decision-making.

(a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;
(b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;
(c) the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
(d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;
(e) improved valuation, pricing and incentive mechanisms should be promoted.

[15] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3A (b).
[16] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3A (c).
[17] See for example, *Protection of the Environment Administration Act 1991* (NSW) s 6 (1).
[18] Godden and Peel, above n 10, 139.

2.3 Approaches to environmental protection in Australia

2.3.1 Regulatory models

Australia has adopted a variety of approaches to environmental protection. Godden and Peel have identified five regulatory models in operation at present in Australia: the common law model, the command and control model, the community participation model, the market-based model, and the incentive-and-information-based model.[19] Although primarily Australia has adopted a command and control approach to the regulation of environmental harm, it has increasingly moved towards new regulatory models.[20] Each model represents a different conceptualisation of the human/environment relationship, and the appropriate role of the state in its regulation. The common law model conceptualises the environment through the paradigm of property law, with environmental protection occurring as a by-product of the protection of property rights (for example, through using nuisance or trespass actions).[21]

Whereas, the command and control model conceptualises the environment as an object which must be protected using the regulatory and enforcement power of the state.[22] In contrast, rather than focusing on the state, new regulatory models place responsibility on other actors and institutions. For instance, the market-based model views the role of the state as a regulator of market rules, and places faith in the ability of the market to 'achieve an efficient allocation of environmental resources at reduced cost'.[23] These different models utilise different tools and mechanisms to address environmental problems.[24] As the command and control model is the key regulatory model, it is useful to consider the regulatory tools associated with this approach.

2.3.1.1 Command and control approach

Primarily, the command and control approach is operationalised through the passage of environmental protection legislation at the Commonwealth and state/territory levels. Responsibility for environmental protection is divided between the Commonwealth and

[19] Godden and Peel, above n 10, 144.
[20] Ibid.
[21] Ibid 145.
[22] Ibid 147.
[23] Ibid 149.
[24] Ibid 153.

state/territory governments, with the majority of environmental planning, approvals and assessments occurring at the state/territory and local government level. However, increasingly the Commonwealth is playing a greater role in environmental management and protection, through the passage of national legislation and the creation of national environmental policies. The Commonwealth's premier piece of environmental legislation is the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act*'). The *EPBC Act* is a complex statute, which is guided by a number of objects listed under s 3 (1). The objects include the objective of promoting ESD through the conservation and ecologically sustainable use of natural resources, and providing for the protection of the environment (in particular, matters of national environmental significance).[25] The Act aims to achieve these objectives through various mechanisms. It outlines a number of 'matters of national environmental significance' ('MNES') which are protected under the legislation, including world heritage properties, national heritage places, wetlands of international importance, listed threatened species and ecological communities, migratory species protected under international agreements, Commonwealth marine areas, the Great Barrier Reef Marine Park, nuclear actions and water resources in relation to coal seam gas development and large coal mining development.[26] Actions that have or are likely to have a significant impact on the MNES are subject to the legislation's assessment and approval processes.

Failure to adhere to the Act's requirements can result in the application of civil and criminal penalties (the 'control' aspect of the command and control model). The Department of the Environment's *Compliance and Enforcement Policy* for the Act explains that the Department uses a range of monitoring and compliance auditing procedures to ensure compliance with the legislation.[27] However, despite the institutional structures in place to ensure that the Act achieves its objectives in practice, there are various criticisms of the operation of the legislation. Godden and Peel argue that although the Act has had various positive influences on improving environmental protection in Australia, there are a number

[25] *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 3 (1) (a)-(b).
[26] Department of the Environment (Cth), *What is Protected Under the EPBC Act?* <https://www.environment.gov.au/epbc/what-is-protected>.
[27] Department of the Environment (Cth), *Compliance and Enforcement Policy: Environment Protection and Biodiversity Conservation Act 1999* (2013) 9 <https://www.environment.gov.au/epbc/publications/epbc-compliance-and-enforcement-policy>.

of 'dark sides' to its operation.[28] They argue that these dark sides 'may detract from, or even overshadow entirely, its possible virtues'.[29] Specifically, they identify 'three potential weaknesses' of the Act, 'which may constrain its future development as a mechanism for advancing best practice environmental impact assessment':[30]

1. the vagaries of government administration of the Act (particularly at the 'political' level of ministerial decision-making);
2. the heavy reliance placed on environmental groups to scrutinise federal decision-making and to take action in response to government or developer lapses; and
3. the likely need to depend on the courts, rather than the federal government, for future progressive development of the environmental impact assessment requirements of the legislation.

A number of these criticisms have been echoed by other commentators, who have criticised both the design and operation of the Act. For instance, Macintosh argues that the legislation suffers from significant 'structural issues' which are hindering its ability to achieve its objectives.[31] Examination of the practical outcomes of the Act's processes appear to support the conclusion that the Act's effectiveness is limited. A study of the environmental outcomes of 50 referrals between 2008 and 2012 revealed 'limited evidence for positive environmental outcomes'.[32] Despite these critiques, various commentators have reported on a number of positive outcomes flowing from the enactment of the legislation. For instance, Chris McGrath argues that there are a number of important examples of the Act's provisions being successfully utilised to achieve its objectives.[33] Whilst it is not possible to resolve these debates over the effectiveness of the legislation, it suffices to demonstrate that there is significant scholarly division regarding the Act's utility.

The Commonwealth Parliament has also passed legislation over a range of other environmental protection and management areas, including heritage protection, Antarctic

[28] Positive impacts include, 'ensuring government accountability' and acting as an 'influence on state-based environmental impact assessment': Lee Godden and Jacqueline Peel, 'The *Environment Protection and Biodiversity Conservation Act 1999* (Cth): Dark Sides of Virtue' (2007) 31 *Melbourne University Law Review* 106, 106.
[29] Ibid 135.
[30] Ibid.
[31] For example, see Andrew Macintosh, 'Why the Environment Protection and Biodiversity Conservation Act's Referral, Assessment and Approval Process is Failing to Achieve its Environmental Objectives' (2004) 21 (4) *Environmental and Planning Law Journal* 288, 302.
[32] Susan Tridgell, 'Evaluating the Effectiveness of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth): 2008-2012' (2013) 30 (3) *Environmental and Planning Law Journal* 245, 245.
[33] Chris McGrath, 'Swirls in the Stream of Australian Environmental Law: Debate on the EPBC Act' (2006) 23 (3) *Environmental and Planning Law Journal* 165, 170-176.

protection, water resources protection, hazardous waste management and ozone protection.[34] However, its legislative reach is limited by the scope of its legislative power granted under the *Commonwealth Constitution*. Accordingly, in various areas of environmental management and protection the Commonwealth has been required to engage in a form of co-operative federalism with the states. In 1992, this resulted in the creation of the *Intergovernmental Agreement on the Environment*, which is an agreement between the Commonwealth and state/territory governments setting out their respective responsibilities, and agreeing upon key environmental protection and management principles.[35] Since that agreement, the Commonwealth and state/territory governments have worked together on various environmental protection issues, including most notably, protection of Australia's water resources.

Environmental protection legislation based on the command and control model also exists at the state/territory level.[36] The general approach adopted across state/territory jurisdictions is to regulate environmental issue areas separately utilising specific legislation, in conjunction with general environmental protection legislation guided by broader environmental policies and planning objectives. This approach has enjoyed significant success at regulating certain 'traditional' environmental problems (such as point source water pollution).[37] However, it is generally less effective in addressing new types of environmental issues caused by multiple lawful individual actions (such as climate change caused by greenhouse gas emissions, and diffuse source water pollution).[38] Acknowledging the limitations of traditional command and control approaches for regulating these new challenges, increasing recourse has been made to alternative models, such as the market-based approach to environmental protection.[39]

2.3.1.2 Market-based approach

An increasingly important alternative and supplementary approach to traditional command and control regulation is the market-based model. Although this approach has not yet been

[34] Department of the Environment (Cth), *Legislation* <https://www.environment.gov.au/about-us/legislation>.
[35] Department of the Environment (Cth), above n 9.
[36] For a summary of relevant statutes, see Godden and Peel above n 10, 159-160.
[37] Ibid, 148.
[38] Ibid.
[39] Ibid 149.

widely utilised, and continues to be the subject of debate, it has been applied in a number of environmental protection contexts. Most significantly, a market-based approach has been adopted in the water management context, through the creation of a national water market (comprised of various component markets).[40] The market facilitates the trade of tradeable water rights (also referred to as 'water products') with the aim of enabling 'available water resources to be put to their most efficient use'.[41] Through the creation of environmental water entitlements, it is also possible for the environment itself to act as a participant in the market.[42] Whilst the full effects of these reforms won't be felt for a number of years, there are already discernible benefits associated with this approach.[43] For the most part, possible adverse environmental impacts associated with trading have not eventuated.[44] In light of the growing complexity and scope of modern environmental problems, it is likely that Australian environmental protection will continue to explore these types of new approaches.

[40] Bureau of Meteorology (Australia), *About the Water Market* <http://www.nationalwatermarket.gov.au/about/index.html>.
[41] Department of Environment, Land, Water and Planning (Vic), *Water Entitlements and Trade* <http://www.depi.vic.gov.au/water/governing-water-resources/water-entitlements-and-trade>.
[42] For example, see Victorian Environmental Water Holder <http://www.vewh.vic.gov.au/home>.
[43] National Water Commission, *Water Markets in Australia: A Short History* (2011) 115 <http://www.nwc.gov.au/__data/assets/pdf_file/0004/18958/Water-markets-in-Australia-a-short-history.pdf>.
[44] As noted by the National Water Commission (ibid), '[i]n principle, water trading can cause adverse environmental impacts if it leads to more water being used in absolute terms (particularly where water is over allocated), more water being used in inappropriate areas, or reduced river flows (for example, where trade increases the amount of water extracted for irrigation upstream in a river catchment and reduces the amount that would otherwise flow down the river to be used by irrigators further downstream.'

2.4 Challenges facing environmental protection in Australia

Although Australia's approach to environmental protection compares favourably to numerous jurisdictions around the world, there is still significant room for improvement. Determining to what extent current approaches adopted under Australian environmental law have been effective in protecting the Australian environment is a task deserving of its own thesis. It is notoriously difficult to accurately and comprehensively ascertain the impact of law generally, and it is particularly challenging in the case of the environment. However, there are a few possible indicators which may provide an insight into the effectiveness of Australia's environmental protection systems. In particular, the current state of Australia's environmental health, and the nature and extent of continuing environmental challenges.

2.4.1 State of Australia's environmental health

In order to measure the success of current approaches to environmental protection, it is not sufficient to simply determine the state of Australia's environmental health. There are two main reasons for this. Firstly, it is difficult to settle on a definition of 'environmental health', as there is a wide range of possible definitions available. For instance, it could mean how functional the natural environment is for humans and non-human animals, such as 'fishable and swimmable' water, arable land and breathable air. Alternatively, it could denote a higher standard, which includes biodiversity and sustainability considerations. The standard could be ascertained by reference to human rights standards, exploring the level of environmental health necessary to meet human rights obligations. Relevant rights include the right to health and the right to an adequate standard of living. Assessing the state of Australia's environmental health against such standards would require the application of human rights indicators to assess progress towards realisation of the rights and the fulfilment of the obligations they impose.

Secondly, the achievement of some degree of environmental health does not necessarily imply that environmental protection approaches have been successful at adequately regulating the relationship between humans and the natural environment, and in achieving their objectives. Environmental health could be attributed to various other factors, including cultural change, or the absence of environmental pressures. Moreover, it fails to account for the manner in which environmental protection is achieved. For instance, it could be possible

for a government to secure a healthy environment through draconian measures, with little or no public input into the decision-making process.

Whilst acknowledging the limitations of environmental health as a measure of the effectiveness of environmental protection strategies, the state of the Australian environment is undeniably a relevant factor for consideration. State of the Environment reporting 'is the internationally and nationally accepted method for assessing environmental performance'.[45] It occurs nationally and in each of the states and territories. The most recent national research conducted by a committee of independent experts reveals that whilst 'much of Australia's environment and heritage is in good shape, or improving', other aspects 'are in poor condition or deteriorating'.[46] The Report warns of numerous serious developing risks to the state of Australia's environmental health, in particular the impacts of climate change and a growing population.[47] Accordingly, whilst the report card contains numerous positive indications of successful environmental management, there are significant areas for improvement in terms of how Australia manages existing and developing environmental problems. These general trends are confirmed at the state and territory level, although there are differences in the nature and extent of successes and challenges between the jurisdictions.[48]

[45] Department of Environment and Heritage Protection (QLD), *State of the Environment Queensland 2011* (2011) ii <http://www.ehp.qld.gov.au/state-of-the-environment/report-2011/pdf/executive-summary.pdf>.
[46] State of the Environment 2011 Committee, *In Brief The Australian Environment in 2011* <http://www.environment.gov.au/science/soe/2011-inbrief/australian-environment#ib1>.
[47] Ibid.
[48] See generally; NSW Environment Protection Authority, *NSW State of the Environment 2012* (2012) <https://www.epa.nsw.gov.au/soe/soe2012/summary.htm>; Commissioner for Environmental Sustainability Victoria, *Victoria State of the Environment 2013* (2013) <https://www.ces.vic.gov.au/sites/default/files/publication-documents/Introduction.pdf>; Environmental Protection Authority (WA), *State of the Environment Report 2007* (2007) <http://www.epa.wa.gov.au/abouttheepa/soe/2007/Pages/default.aspx>; Environment Protection Authority (SA), *State of the Environment Report 2013 South Australia* (2013) <http://www.epa.sa.gov.au/soe_2013/index.html>; Office of the Commissioner for Sustainability and the Environment, *ACT State of the Environment Report 2011* (2011) <http://reports.envcomm.act.gov.au/actsoe2011/executive_summary.html>; Department of Environment and Heritage Protection (QLD), *State of the Environment Queensland 2011* (2011) ii <http://www.ehp.qld.gov.au/state-of-the-environment/report-2011/pdf/executive-summary.pdf>.

2.4.2 Environmental protection challenges

Serious threats to the health and sustainability of the Australian environment continue to pose significant challenges for environmental protection. These include, but are not limited to, climate change, biodiversity loss, habitat loss, and salinity. Identifying the key challenges facing environmental protection in Australia is ultimately a question of opinion, involving various political and value judgements. There is a diversity of opinion regarding every stage of the environmental protection process, including the assessment of the need, extent and application of environmental protection, the selection of appropriate methods and the implementation of those methods. Whilst acknowledging this, it is possibly to identify various general social, economic, political and legal challenges facing environmental protection in Australia.

2.4.2.1 Economic challenges

In order to protect the environment adequately, it may be necessary to place limits on economic growth in certain instances.[49] The nature and rationale of such limits is largely dependent on the approach to environmental protection adopted. As discussed below in Chapter Three, adherents to an earth jurisprudence or 'wild law' approach may perceive that there are certain 'ecological limits' which can not be exceeded. Respecting these limits may involve placing limits on economic growth to some extent. Human rights-based approaches to environmental protection may require limits to economic growth in order to maintain a standard of environmental health necessary to fulfil human rights obligations. An ESD approach may require limits to be placed on economic development where development is not ecologically 'sustainable'. Accordingly, it can be seen that it is possible that contradictions may be perceived between the pursuit of environmental protection and the pursuit of economic growth. Determining how to achieve a balance between the sometimes competing objectives of economic growth and environmental protection represents one of the most significant challenges for environmental protection both globally, and in Australia. Whilst attempts have been made to create economic incentives to assist in the achievement of environmental protection in Australia, the fact remains that there are numerous economic incentives for individuals, corporations and governments to take actions which cause or do not adequately take into consideration environmental harm and environmental sustainability.

[49] However, it must be acknowledged that economic prosperity can lead to improved environmental outcomes.

2.4.2.2 Political challenges

There is a broad diversity of opinion regarding the goals of environmental protection, and the nature of the human/environment relationship. Significant political divergence exists over crucial questions, such as the value and role of the natural environment and the best approaches to environmental protection. For instance, in Australia, there are numerous political disagreements between the Greens party and other major political parties on key environmental issues, including whether Australia should put a price on carbon, whether new coal mines should be approved in an age of climate change, and how to best operationalise the principles of ESD. Although to some extent these political disagreements contribute to an informed public dialogue on these contested issues, they continue to pose challenges for the achievement of environmental protection.

2.4.2.3 Social challenges

Raising public awareness over environmental issues is an important means of achieving adequate environmental protection. In order to encourage public participation in environmental decision-making processes, it is vital that the public have access to information about environmental issues, and are equipped with the tools necessary to take action. However, despite various environmental campaigns by governments and non-government organisations, numerous relatively easily addressed environmental problems continue to persist. For instance, it is possible for the vast majority of human waste to be recycled and for the vast majority of energy to be sourced from renewable sources. Despite this, both waste and non-renewable energy continue to pose problems for the health of the natural environment. Countering natural human tendencies to prioritise other competing considerations over and above sustainability considerations is an ongoing challenge which will need to be counteracted with a range of approaches.

2.4.2.4 Legal challenges

Related to the political challenges discussed above, there are various challenges associated with the legal system and the laws impacting on the natural environment. As demonstrated, despite the existence of a broad range of laws and policies designed to achieve environmental protection, various significant environmental problems continue to exist. A number of these regulatory failures can be attributed to deficiencies within the content of the law, whilst

others can be attributed to inadequate compliance and enforcement.[50] Achieving law reform and improving compliance and enforcement is an ongoing challenge which is inextricably linked to the political challenges discussed above. The nature and degree of reform in this regard is dependent on how the environment is valued and how competing political values and priorities are balanced.

Although this is by no means a comprehensive list of the challenges currently facing the pursuit of environmental protection in Australia, it is indicative of some of the key issues.

[50] The Environmental Defenders Offices of Australia have been researching and highlighting deficiencies in Australian environmental laws and their enforcement over the past few decades. For further information on areas for reform, see: Environmental Defenders Offices of Australia, *Policy Submissions* <http://www.edo.org.au/submissions>. The scholarship of Chris McGrath has also shed light on the various inadequacies in environmental law content and implementation in Australia. For a list of relevant publications, see: Chris McGrath, *Publications*, Environmental Law Australia <http://envlaw.com.au/publications/>.

2.5 Approach to environmental protection in the Australian water resources management context

Australian water resources management has been selected as the case study for the thesis, as protection of water resources is one of the key environmental management areas that may be impacted by adoption of a rights-based approach to environmental protection. Accordingly, it is necessary to provide context for the case study analysis by outlining the current approach to environmental protection in the Australian water resources management context. As water resources management covers a broad range of issues, in order to scope the analysis, the thesis focusses specifically on the challenges of achieving sustainable water resources management and water quality and pollution regulation in the Murray-Darling Basin.

2.5.1 Water and the Murray-Darling Basin (MDB)

Water is the most precious natural resource on Earth. Humans, animals and the environment are united and divided by their common dependence on this finite yet renewable substance. It is distinguishable from other natural resources (such as oil) by its necessity for life, and the absence of any substitute. It is at once a public good and a valuable commodity, capable of invoking both cooperation and conflict. Although the value of water is widely recognised, this recognition does not always translate into adequate protection of water resources from excessive human interference.

It is an oft quoted fact that Australia has the distinction of being the world's driest inhabited continent. It is perhaps lesser known that the Australian hydrological cycle can also lay claim to having the 'world's highest rainfall variability'.[51] The unique nature of the Australian hydrological cycle is important to appreciate, especially when human population distribution is taken into consideration. The majority of Australia's 24 million (approx.) people live near the coast, with a vast proportion of the nation's interior occupied by desert, and little else. As a result, there is a significant water demand placed on the nation's limited and highly variable water resources. In line with a global trend, most of Australia's water is consumed by agricultural industries, and recent statistics demonstrate that this water use is increasing.[52]

[51] National Water Commission, *Water Challenges in Australia* <http://nwc.gov.au/publications/topic/corporate/corporate-brochure/corporate-brochure>.
[52] Australian Bureau of Statistics, *Information Paper: Towards the Australian Environmental-Economic Accounts* (2013) ch 2

The bulk of Australia's agricultural water consumption occurs in the Murray-Darling Basin region ('MDB'), which is widely referred to as Australia's 'food bowl'.[53] The Basin is home to approximately four million people and twenty three rivers across four states (QLD, NSW, Vic, SA) and one territory (ACT).[54] Accordingly, the way in which the MDB's water is managed directly impacts on the continued viability of Australia's economy, and food security. For this reason, the following section considers how the Australian approach to water resources management has evolved generally, and specifically in regards to the management of the Basin's water resources.

2.5.2 Evolution of Australian water resources management

As noted by Fisher, '[i]t is now recognised that the quality and quantity of water resources are just as much a function of cultural, social, economic, political and legal considerations as they are a function of a range of natural phenomena.'[55] Whilst some countries are naturally 'water rich' or 'water poor', the availability and health of water resources is ultimately determined by the way in which governments manage the resources within their jurisdiction. Naturally water scarce landscapes can be managed in order to provide a balance between competing users, and ensure water for the future. Conversely, poor water management in a 'water rich' country can result in diminished water availability and quality. In other words, the health of a nation's water resources is not entirely a question of hydrogeological 'luck', but rather the product of a complex range of legal, political and policy factors.

Over the course of Australia's relatively short history as a nation, a number of different approaches to managing water have been utilised. The evolution of these approaches paints a picture of a nation gradually realising the true value of its limited water resources. Initially, Australia's approach to water management was informed by English attitudes towards water use, reflecting our early nation's close ties to the United Kingdom.[56] As noted by a number of commentators, the reception of English water laws and policies was not ideal, given the

<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4655.0.55.002Main%20Features42013?opendocument&tabname=Summary&prodno=4655.0.55.002&issue=2013&num=&view=>.

[53] Murray-Darling Basin Authority, *Irrigated Agriculture in the Basin - Facts and Figures* <http://www.mdba.gov.au/about-basin/irrigated-agriculture-in-the-basin>.

[54] Murray-Darling Basin Authority, *Water* <http://www.mdba.gov.au/discover-basin/water>.

[55] D E Fisher, *Water Law* (LBC Information Services, 2000), 1.

[56] National Water Commission, above n 43, 19.

significant differences between the countries in terms of both water availability and water demand.[57] The application of English common law doctrines was inappropriate for the nature of Australian water resources, and resulted in the development of inadequate water governance regimes.[58]

With the growth of the nation came recognition of the need to plan for the use and development of water resources in order to facilitate economic development. As Australia was heavily reliant on agriculture for its economic growth, water was viewed as a key component in government policies designed to increase agricultural output. Surface water resources were over-allocated in most key agricultural regions, which combined with natural climate variations created increasingly severe and more frequent water availability issues. Groundwater resources were over exploited and lacked adequate oversight and monitoring to ensure future availability. By the turn of the twenty first century, Australia was experiencing its most severe drought in recorded history. Pressure was placed on Australian governments, especially the federal government, to develop an adequate response to the desperate state of Australia's water resources. The great diversity of relevant stakeholders (agricultural industries, indigenous communities, environmentalists, etc…) and the complexity of the social, economic and scientific issues involved made for a novel policy challenge. These challenges were further exacerbated by the distribution of powers between the Commonwealth and state/territory governments, as under the stewardship of state/territory governments Australia's water resources had deteriorated significantly.

By the 2000's, a number of Australian capital cities were under severe water restrictions, whilst significant rivers no longer reached the sea. A national perception of state/territory government policy failure led to calls for increased Commonwealth involvement in water management.[59] Given its significant value as a natural resource, understandably a number of state governments were wary of accepting this Commonwealth incursion into an area which had traditionally fallen under the ambit of state control. The foundations of this federal division of powers can be found in the *Australian Constitution*, which fails to adequately address environmental management generally, or water management specifically. Under the

[57] Ibid.
[58] Ibid.
[59] Kate Stoeckel, Romany Webb, Luke Woodward and Amy Hankinson, *Australian Water Law* (Thomson Reuters 2012) 6.

Constitution, the Commonwealth possesses no direct legislative power to legislate with respect to water resources.[60] However, despite this absence of direct regulatory authority, the Commonwealth has a range of mechanisms available to exert control over water management within, and between states/territories.[61] This ranges from the provision of conditional financial assistance to the states (s 96) to the use of indirect legislative power (for example, the external affairs power).[62] There is only one specific express limitation on the Commonwealth's power over state water resources.[63]

Section 100 stipulates that the Commonwealth 'shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.' Unfortunately, the content, scope and nature of this limitation on Commonwealth power and the meaning and application of the 'right' or 'rights' referred to are still unclear. However, it is clear *why* the section was originally included within the *Constitution*. At the time of its birth, certain states were concerned about the need to prevent a Commonwealth takeover in this area.[64] In particular, they were concerned that the Commonwealth might legislate to 'ensure river navigability' to the detriment of state irrigation interests.[65] Although the High Court has had a number of opportunities to clarify the interpretation of the section, unfortunately it has failed to provide clear direction, resulting in the current uncertain state of the law.[66]

Despite this uncertainty, it is evident that the Commonwealth has significant legislative and political scope to mount a national response to Australia's water issues. The gradual increase in Commonwealth involvement has been evidenced through the creation and expansion of Commonwealth laws, policies and institutions governing water management. The first

[60] For a discussion of the extent of Commonwealth legislative power with respect to environmental management more generally, see: Sangeetha Pillai and George Williams, 'Commonwealth Power and Environmental Management: Constitutional Questions Revisited' (2015) 32 *Environmental and Planning Law Journal* 395.
[61] Stoeckel, Webb, Woodward and Hankinson, above n 59, 5.
[62] Ibid.
[63] There are of course more general limitations on Commonwealth legislative power.
[64] See generally Daniel Connell, 'Section 100 – a Barrier to Environmental Reform?' (2003) 8 (2) *Australasian Journal of Natural Resources Law and Policy* 83.
[65] Paul Kildea and George Williams, 'The Constitution and the Management of Water in Australia's Rivers' (2010) 32 *Sydney Law Review* 595, 601.
[66] For a discussion of the most relevant High Court case (*Arnold v Minister Administering the Water Management Act 2000* (2010) 240 CLR 242) concerning the interpretation of the section, see: Meg Good, 'Implementing the Human Right to Water in Australia' (2011) 30(2) *University of Tasmania Law Review* 107, 122-123.

significant move towards Commonwealth direction in the area occurred in 1994 with the introduction of the COAG Water Reform Framework.[67] The 'most controversial elements' of the Framework reform agenda were 'the formal allocation of water to the environment' and the 'separation of water property rights from land title'.[68] Both of these reforms were aimed at improving the sustainability of water resource management. In order to implement the reforms agreed to in the Framework Agreement, six state/territory jurisdictions reformed their relevant water legislation (two had already done so), facilitating *inter alia* the allocation of environmental water and the separation of water access entitlements from land titles.[69]

Developing on this foundation, in 2004 the National Water Initiative (NWI) was introduced to 'complement and extend' the 1994 reform agenda.[70] The NWI functions as Australia's key water policy document, guiding the implementation of further reforms.[71] The NWI required the COAG parties to agree to a number of objectives, which would cumulatively lead to the 'economically efficient' use of water and improve 'environmental water outcomes'.[72] The third biennial assessment of the implementation of the NWI in 2011 revealed that although the reforms have 'delivered substantial improvements in the way Australia manages its water resources… there are areas where implementation can improve, and new challenges have arisen'.[73] Accordingly, the (recently decommissioned) National Water Commission has called for 'renewed political commitment' to national reform, in order to ensure that the NWI fulfils its objectives.[74]

---

[67] Department of the Environment (Cth), *The Council of Australian Governments' Water Reform Framework* (1994) <https://www.environment.gov.au/resource/council-australian-governments-water-reform-framework>.
[68] Penny Carruthers and Sharon Mascher, 'The Story of Water Management in Australia: Balancing Public and Private Property Rights to Achieve a Sustainable Future' (2011) 1 *Property Law Review* 97, 107.
[69] Ibid, 108.
[70] Council of Australian Governments, *Intergovernmental Agreement on a National Water Initiative* (2004) [4] <http://nwc.gov.au/__data/assets/pdf_file/0008/24749/Intergovernmental-Agreement-on-a-national-water-initiative.pdf>.
[71] Department of the Environment (Cth), *National Water Initiative* <https://www.environment.gov.au/topics/water/australian-government-water-leadership/national-water-initiative>.
[72] National Water Commission, *NWI Objectives* <http://nwc.gov.au/nwi/objectives>.
[73] National Water Commission, *The National Water Initiative – Securing Australia's Water Future: 2011 Assessment* (2011) Executive Overview <http://nwc.gov.au/publications/topic/assessments/ba-2011/executive-overview#sec-a-p3>.
[74] Ibid.

As a result of the 1994 and 2004 reforms, Australia is now home to the world's most advanced water trading market, worth approximately $1.4 billion dollars.[75] The development of the Australian water market was facilitated by the separation of water access rights from land, in order to enable trading.[76] The rationale for water trading is that scarce water resources will be allocated according to the highest valued use.[77] Although the implementation of trading in water access entitlements has not been free from criticism, it is undeniable that water trading has had a significant impact on water distribution and allocation. As noted by the National Water Commission, water trading has delivered significant economic benefits and 'has been a major success story in water policy reform'.[78] The Commission argues that traditional approaches to water resources management could not have achieved these results, stating that 'it is inconceivable that centrally determined systems of water provision to competing users would have enabled the flexible movement and reallocation of water that has occurred over the past decade.'[79]

2.5.3 The *Water Act 2007* (Cth) and the MDB

The exertion of Commonwealth power reached a significant peak in 2007, with the introduction of Australia's first national piece of water management legislation, the *Water Act* 2007 (Cth) ('*Water Act*'). The *Water Act* established a co-ordinated national approach to the management of Australia's largest river system, the Murray-Darling Basin (MDB). It was also in itself a landmark piece of Australian legislation, representing an unprecedented expression of Commonwealth power over an area formerly solely governed (largely separately) by five state/territory governments. As noted by Kildea and Williams, the legislation represented a departure from a general trend whereby 'the Commonwealth has largely been unwilling to use its coercive powers to wrest control of rivers management from the states'.[80]

[75] According to the most recent National Water Commission report: National Water Commission, *Australian Water Markets Report 2012-13* (2013) <http://www.nwc.gov.au/publications/topic/water-industry/australian-water-markets-report-2012-13>.
[76] Vicki Waye and Christina Son, 'Regulating the Australian Water Market' (2010) 22 (3) *Journal of Environmental Law* 431, 434.
[77] Bureau of Meteorology (Australia), *Water Market Information* <http://www.nationalwatermarket.gov.au/>.
[78] National Water Commission, above n 43, xi.
[79] Ibid.
[80] Paul Kildea and George Williams, 'The Constitution and the Management of Water in Australia's Rivers' (2010) 32 *Sydney Law Review* 595, 613.

The Act provides for the creation of a 'Basin Plan' to guide the sustainable management of the Basin's water resources.[81] A new Commonwealth authority created under the Act (the Murray-Darling Basin Authority) was tasked with the duty of creating the Plan, which has been described as 'one of the most controversial pieces of public policy in recent history'.[82] Under the Act, the Authority is required to develop a Plan which limits the amount of water capable of being diverted from the river system to sustainable levels, known as Sustainable Diversion Limits ('SDLs').[83]

Draft versions of the Plan were met with significant opposition and criticism from various stakeholders, including irrigators, environmentalists and scientists. Famously, one version of the Plan was publicly burnt by a discontent irrigator, protesting the Authority's methodology for arriving at the SDLs.[84] The final version of the Plan, which has now passed into law, is also not free from criticism.[85] Some critics have argued that the SDLs set under the Plan are inadequate for achieving sustainability, whilst others have argued that they go too far and prioritise environmental outcomes over social/economic outcomes.[86]

The issue of how to balance sometimes competing social, economic and environmental considerations has been at the heart of many water law and policy debates in Australia, especially in regards to the *Water Act*. The objects of the Act are outlined in Section 3, which states that one of the objects is to 'give effect to relevant international agreements'.[87] In giving effect to these agreements, the Act aims to promote the management of the Murray Darling's water resources in 'a way that optimises economic, social and environmental outcomes'.[88] Since the Act's introduction, significant legal and political debate has focused on the interpretation of the requirement that 'economic, social and environmental' resources

[81] *Water Act 2007* (Cth), s 20.
[82] Rebecca Lester, 'Coorong Recovery Begins, but Still Room for Improvement' (2012) *The Conversation* <https://theconversation.com/coorong-recovery-begins-but-still-room-for-improvement-5810>.
[83] *Water Act 2007* (Cth), s 22.
[84] Fiona Parker, 'Local Reaction to the Latest Draft Murray Darling Basin Plan' *ABC News* (online), 28 November 2011 <http://www.abc.net.au/local/audio/2011/11/28/3378140.htm>.
[85] *Basin Plan 2012* (Cth).
[86] For discussion of this debate, see 2.6.
[87] *Water Act 2007* (Cth) s 3(b). The Act relies upon a number of international environmental agreements for its constitutional validity, pursuant to the external affairs power.
[88] *Water Act 2007* (Cth) s 3(c).

should be optimised.[89] Although the Act explains that these outcomes should be optimised, it provides minimal guidance on how these different factors should be prioritised.[90]

In 2010, Water Minister Tony Burke sought legal advice regarding the prioritisation of these factors,[91] in response to significant opposition to the Murray-Darling Basin Authority's *Guide to the Proposed Basin Plan*.[92] The Australian Government Solicitor advised that 'the overarching objective of the Act and the Plan is to give effect to relevant international agreements', and that 'both the Convention on Biological Diversity and the Ramsar Convention on Wetlands appear to frame their environmental obligations in ways that permit consideration of social and economic factors'.[93] However, some commentators argued that the balance used by the Authority in designing the *Guide* inappropriately prioritised environmental outcomes.[94] Legal advice from Professor George Williams advised that the MDBA was *required* to 'give primacy to the environment' in order to 'faithfully implement' the international agreements referred to in the legislation.[95]

However, others argued that what was required was a 'balance' between environmental and socio-economic factors. For example, the NSW Irrigators' Council argued that 'the Objects of the *Water Act* (Cth) 2007 are not reflected in the balance of the *Act* and, in particular, in the priorities of the Basin Plan.'[96] According to their interpretation, the Act provides for

[89] In the legislation's 2014 Independent Review, the Review Panel noted that many of the submissions received 'expressed concern that environmental considerations are prioritised over social and economic considerations, and suggested amendments to the objects and to various provisions in the Act to provide a 'more balanced' consideration of economic, social and environmental outcomes': Commonwealth of Australia, *Report of the Independent Review of the Water Act 2007, Commonwealth of Australia 2014* (2014) 3 <http://www.environment.gov.au/system/files/independent-review-water-act-2007.pdf>.
[90] However, the Act does stipulate that 'critical human water needs are the highest priority water use for communities who are dependent on Basin water resources': *Water Act 2007* (Cth) s 86A(1)(a).
[91] Lenore Taylor, 'Basin Plan Gets Bogged Down in Legal Wrangling' *The Sydney Morning Herald* (online), 26 October 2010 <http://www.smh.com.au/environment/water-issues/basin-plan-gets-bogged-down-in-legal-wrangling-20101026-172eq.html>.
[92] Murray-Darling Basin Authority, *Guide to the Basin Plan* (2010) <http://thebasinplan.mdba.gov.au/guide/guide.php?document=the-murray-darling-basin&chapter=context-for-decisions>. The Murray-Darling Basin Authority is charged with establishing a 'Basin Plan' which takes into consideration the objects of the Act outlined in s 3: *Water Act 2007* (Cth) s 20.
[93] Australian Government Solicitor (2010) cited in Amy Sennett, Emma Chastain, Sarah Farrell, Tom Gole, Jasdeep Randhawa and Chengyan Zhang, *Challenges and Responses in the Murray-Darling Basin* (2014) 16 *Water Policy* 117, 140.
[94] Taylor, above n 91.
[95] Lenore Taylor, 'Burke Fails to Calm Troubled Water Users' *The Sydney Morning Herald* (online), 28 October 2010 <http://www.smh.com.au/environment/water-issues/burke-fails-to-calm-troubled-water-users-20101027-173xz.html>.
[96] New South Wales Irrigators' Council, *Policy for Interaction of Social and Economic Considerations in Setting Sustainable Diversion Limits in the Murray-Darling Basin Plan*

'equal treatment between economic, social and environmental outcomes' and that objective should be reflected in the Plan.[97] However, Bonyhady argues that it is arguable whether the Act intended to achieve a 'balance' between these factors, given the context of its enactment in 2007.[98] He notes that that during parliamentary debate, there had been 'no talk of triple-bottom line', and there 'was no suggestion that all three factors should be treated equally', and 'no discussion of balance'.[99]

Determining the correct prioritisation of these factors has significant practical implications. Under the 2010 approach which prioritised environmental considerations, the MDBA proposed to set the reduction in average surface water diversions at 3-4,000 GL.[100] After a process of political compromise resulted in an interpretation which encouraged a 'balancing' of these factors, this figure was reduced to 2,750 GL.[101] It is anticipated that reducing consumption by this amount will help 'bridge the gap' between current levels of use, and the Sustainable Diversion Limits (SDLs) established under the Basin Plan.[102] As of 30th September 2014, the Commonwealth had recovered '1,908 GL (long-term equivalent) of the 2,750 GL reduction in surface water'.[103] However, those who subscribe to an interpretation of the Act which prioritises environmental factors, maintain that a reduction of 2,750 GL is inadequate for returning the basin to environmental health.[104]

Whilst the legal argument in favour of this approach is arguably stronger than the argument in favour of a 'balancing' approach, from a pragmatic perspective it must be accepted that political considerations will influence whether 'legislation intended to prioritise the environment actually results in the environment being put first'.[105] As has been

<http://www.nswic.org.au/pdf/policy_documents/100311%20-%20Interaction%20of%20SDL%20with%20S&E.pdf>.
[97] Ibid.
[98] Tim Bonyhady, 'Putting the Environment First?' (2012) 29 *Environmental and Planning Law Journal* 316, 323.
[99] Ibid.
[100] Sennett et al, above n 93, 141.
[101] Ibid.
[102] Department of the Environment (Cth), *Environmental Water Recovery Strategy for the Murray-Darling Basin* (2012) 4 <http://www.environment.gov.au/system/files/consultations/c876fb55-785c-4fb4-8759-720c7be86f9d/files/draft-recovery-strategy.pdf>.
[103] Commonwealth of Australia, above n 89, 9.
[104] See for example, Australian Conservation Foundation, *ACF Submission on the Draft Murray-Darling Basin Plan 2011* (2012) <https://www.acfonline.org.au/sites/default/files/resources/ACFBasinPlanSubmission160412.pdf>.
[105] Bonyhady, above n 98, 327.

demonstrated over the course of the water reform debate in Australia, attempts at prioritising the environment which involve reducing water use rights can be highly politically divisive. Despite this and other challenges however, the fact remains that Australia's water reform experiment in the MDB has been in many respects a policy success. As noted by Skinner and Langford, the legislation 'is an ambitious reform agenda that aims to recover water for the environment to an extent that is as yet unprecedented globally'.[106] In terms of outcomes, they observe that the Act 'has led to increases in irrigation productivity, significant environmental benefits, and higher water security for all water users, which will improve resilience and adaptive capacity for future droughts and climate change'.[107]

The environmental benefits associated with the *Water Act* reforms are undeniable, yet difficult to quantify. As reported by the Commonwealth Environmental Water Office, '[a]s at 31 December 2015, over 5,183 gigalitres of Commonwealth environmental water has now been delivered to rivers, wetlands and floodplains of the Murray-Darling Basin.' [108] However, Crase et al argue that 'too much emphasis' has been placed on 'the volume of held water as an indicator of environmental benefit' and a presumed causal relationship between increasing held water and increasing 'environmental benefit'.[109] They argue that this is regrettable as 'continued focus on volumetric measures as a policy ambition disguises important nuances, especially when it comes to environmental water management'.[110] In particular, they note the non-linear nature of 'trade-offs' between lowering SDLs and impacts on irrigators.[111] They observe that 'halving SDLs will not halve the environmental benefit and may well inflict monetary disadvantage on some irrigators for no recognisable gain on the environmental front.'[112]

Conflict over appropriate volumetric water allocations in the MDB, and the prioritisation of the environment over other interests has led to various legal challenges to water reform legislation. Some particularly relevant cases hail from NSW, as a result of its experience

[106] Dominic Skinner and John Langford, 'Legislating for Sustainable Basin Management: The Story of Australia's Water Act' (2007) 15 *Water Policy* 871, 891.
[107] Ibid.
[108] Department of the Environment (Cth), *About Commonwealth Environmental Water* <https://www.environment.gov.au/water/cewo/about-commonwealth-environmental-water>.
[109] Lin Crase, Suzanne O'Keefe and Brian Dollery, 'Presumptions of Linearity and Faith in the Power of Centralised Decision-Making: Two Challenges to the Efficient Management of Environmental Water in Australia' (2012) 56 *Australian Journal of Agricultural and Resource Economics* 426, 436.
[110] Ibid.
[111] Ibid.
[112] Ibid.

with the introduction of new water management legislation designed to address the fact that 'NSW was at the limits of its available water resources' and ecological degradation of water resources was resulting in 'water quality problems, loss of species, wetland decline and habitat loss'.[113]

In 2009, the case of *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 ('*ICM*') was considered by the High Court, involving a challenge to the validity of a licence conversion effected under new NSW legislation which resulted in a reduction of the plaintiffs' water access entitlements.[114] The entitlements were reduced as part of a broader scheme to return the system to a state of environmental health and put the aquifer 'on a more sustainable footing'.[115] Although the challenge was ultimately unsuccessful on various grounds, it served to demonstrate the difficulty of balancing the State's duty and right to regulate water in the public interest, with the interests of private beneficial users of water. The case confirmed that regulation of water resources is the responsibility and the right of government, as water is fundamentally a public resource. Accordingly, if altering the nature of private rights to the resource is necessary to achieve sustainable management, then that falls within the scope of the government's power. Although it was acknowledged that this may inevitably disadvantage certain users in an economic sense, it is in the interests of all users that the long term interest in the viability of the resource is protected through taking preventative action to ensure sustainability.

Following in the wake of *ICM*, a similar unsuccessful challenge was brought by different parties before the NSW Land and Environment Court in 2013 in the case of *Arnold v Minister Administering the Water Management Act 2000 (No 6)* [2013] NSWLEC 73 ('*Arnold*').[116] The judgment in *Arnold* provides an interesting insight into the complexities involved in balancing the sometimes competing water management principles contained within post-reform era water legislation. The judge noted that '[r]ights to use water are of critical importance not just to those who are interested in particular water entitlements but to society as a whole', and emphasised the importance of noting the objectives of the legislation, which were to '[p]rovide for the sustainable and integrated management of the

[113] Department of Primary Industries (NSW), *Law and Policy* <http://www.water.nsw.gov.au/water-management/law-and-policy>.
[114] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140.
[115] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 152.
[116] *Arnold v Minister Administering the Water Management Act 2000 (No 6)* [2013] NSWLEC 73.

water sources of the State for the benefit of both present and future generations'.[117] Accordingly, the judge held that in making water sharing plans, the Minister was obliged to 'give priority to protection of the water source', and to apply the principles of ecologically sustainable development (ESD).[118] In particular, he clarified that in stating that 'the social and economic benefits to the community should be maximised', the legislation should not be interpreted as requiring the Minister to 'maximise the social and economic benefit to the community'.[119] Rather, the Minister was only required to 'take all reasonable steps to generally promote [the water management] principles as a whole'.[120] Taken as a whole, it is clear that the principles have a protective focus. Of the eight general water management principles included in the statute, six have an environmental protection aim. Accordingly, it would seem unreasonable to interpret the statute as requiring the Minister to effectively prioritise social and economic benefits in light of the clear and consistent focus on sustainable management.

The outcomes of both of these challenges (*ICM* and *Arnold*) to legislation prioritising environmental protection of water resources are indicative of a broader shift in Australian water law, policy and management. Where legislation governing the management of water resources has a clear protective aim, absent any legal wrong or contrary indication, judges will interpret that legislation in accordance with Parliament's intention – to prioritise the protection of the environment. This judicial interpretation approach applies even where doing so may result in negative social and economic consequences for individuals, or communities. As noted by Chief Justice of the Land and Environment Court of NSW, the judiciary has 'an important role to play in explicating, upholding and enforcing the law in relation to the sustainable use of Australia's water resources'.[121] For instance, he argues that where existing water use rights are modified by a statutory regime intended to achieve sustainability, judges may need to engage in 'strict interpretation and application of any exception for existing users' in order to 'ensure that the purpose of the policy and any legal reform is not frustrated'.[122]

[117] *Arnold v Minister Administering the Water Management Act 2000 (No 6)* [2013] NSWLEC 73, 8 [1].
[118] Ibid 10 [7].
[119] Ibid 96 [207].
[120] Ibid 97 [207].
[121] The Hon Justice Brian Preston, 'Water and Ecologically Sustainable Development in the Courts' (2009) 6 *Macquarie Journal of International and Comparative Environmental Law* 129, 146.
[122] Ibid, 143.

2.5.4 Monitoring and assessment of key water management reforms

In order to achieve effective water management and to support the key water reforms in the Basin, it is necessary to provide for 'robust, independent and transparent monitoring and assessment'.[123] Over the past ten years, the National Water Commission (NWC) provided independent oversight of national water reform efforts, through a variety of mechanisms. As explained by the NWC, it performed numerous functions, including the promotion of 'informed debate about water issues ranging from urban water management to improvements in the operation of water markets and responding to the emerging impact of coal seam gas developments on water resources'.[124] In 2014, the Australian Government announced its intention to dismantle the NWC, following the completion of the National Commission of Audit. The rationale provided was that in light of 'the substantial progress already made in water reform and the current fiscal environment, there is no longer adequate justification for a stand-alone agency to monitor Australia's progress on water reform'.[125] The Senate Committee tasked with reviewing the proposed legislation which sought to dismantle the Commission recommended in favour of the Government's proposal.[126]

Dissenting voices were provided by Labor, the Greens and an Independent, who all questioned whether the alleged economic gains justified the loss of Australia's only source of truly independent oversight at the federal level in this area.[127] The Commission was the 'only independent federal body that [tracked] water policy' in Australia, and performed a number of vital functions, including providing advice to COAG and the Australian Government on water policy.[128] The Commission was also tasked with auditing 'the effectiveness of the implementation of the Murray-Darling Basin Plan' and promoting water

[123] National Water Commission, Submission No 6 to Senate Environment and Communications Legislation Committee, Parliament of Australia, *Inquiry into National Water Commission (Abolition) Bill 2014* 13 October 2014, 1.
[124] Ibid, 2. The NWC also stated that it 'provided a valuable discipline for NWI implementation across jurisdictions', 'delivered new levels of transparency in the operation of water service providers and water markets', acted as 'the catalyst for important investments in areas of weakness in Australia's national water information and data capabilities, and groundwater knowledge', 'initiated a suite of thought leadership actions and investments to identify new opportunities and risks to good water management, and assumed an important leadership role to progress Indigenous engagement in water planning', and 'invested in the development of new knowledge and tools to addressing practical barriers to improved water management'.
[125] Commonwealth, *Parliamentary Debates*, Senate, 25 September 2014, 7110 (Mitch Fifield).
[126] Senate Environment and Communications Legislation Committee, Parliament of Australia, *National Water Commission (Abolition) Bill 2014 Report* (2014).
[127] Senate Environment and Communications Legislation Committee, Parliament of Australia, *National Water Commission (Abolition) Bill 2014 Report: Dissenting Report by Labor Senators* (2014); Senate Environment and Communications Legislation Committee, Parliament of Australia, *National Water Commission (Abolition) Bill 2014 Report: Australian Greens Dissenting Report* (2014).
[128] Senate Environment and Communications Legislation Committee, above n 126, 1 [1.2].

reform.[129] Dismantling the NWC has resulted in the discontinuation of a number of these functions,[130] with remaining functions divided amongst a variety of existing agencies, including the Department of the Environment and the Productivity Commission.[131] However, various interest groups have raised opposition to this institutional substitution. For example, The Australian Conservation Foundation argued in its submission that abolishing the Commission represents a 'backward step' for Australian water management.[132] They argued that delegating responsibilities to the Productivity Commission could 'result in another wave of conflicts over water due to the absence of what all sides regard as a well-respected expert independent body.'[133] Other groups challenged the necessity of an independent expert body in this context. For instance, the National Irrigators' Council supported the reforms, and argued that removal of the NWC provided 'an opportunity to reduce red tape' and to 'refine and improve upon the often cumbersome monitoring, auditing and reporting burdens placed on industry and state agencies.'[134]

Regardless of the perspective adopted, it is clear that removal of the NWC will have implications for the way in which the NWC's functions are performed. One of the most important functions of the Commission was monitoring progress towards the implementation of the NWI. Accordingly, disbanding the Commission may have implications for the continuing progress of the NWI. In this regard, the Water Services Association of Australia argued that by removing the Commission, Australia has lost 'national water leadership and the fearless advice and independent custodianship of the National Water Initiative'.[135] Arguably, dedicating an independent body to the task of overseeing the implementation of the NWI helps to ensure that water reform remains a key policy issue for government. This function of the NWC in relation to the NWI was noted by the outgoing Chair of the NWC, who raised concerns over the tendency of Australian

[129] Ibid.
[130] These include, 'preparation, at the request of COAG, of a national water planning report card, which provides a summary of water planning across Australia and the level of progress that has been achieved in each planning area' and 'assistance with the effective implementation of the NWI, which includes facilitating interaction between the states and providing 'thought leadership' on water reform': Ibid 6 [1.34].
[131] Ibid, 9 [2.3].
[132] Australian Conservation Foundation, Submission 15 to Senate Environment and Communications Legislation Committee, Parliament of Australia, *Inquiry into National Water Commission (Abolition) Bill 2014* 13 October 2014, 1.
[133] Ibid.
[134] National Irrigators' Council, Submission No 11 to Senate Environment and Communications Legislation Committee, Parliament of Australia, *Inquiry into National Water Commission (Abolition) Bill 2014* 13 October 2014, 2.
[135] Water Services Association of Australia cited in Senate Environment and Communications Legislation Committee, above n 126, 13 [2.23].

governments to prioritise water reform as a policy issue during periods of water stress, and to 'remove resources from water management in times of good supply'. [136] She argued that 'this waxing and waning does not reflect the productivity gains from more efficient water management, both rural and urban, nor does it encourage innovation'.[137] Further, she noted that it 'also risks Australia not being well positioned to respond effectively in the future to the opportunities and challenges posed by economic restructuring, global markets, climate change, technological evolution, and other fundamental shifts in the external context for water management'.[138]

In the Commission's fourth and final assessment of the NWI, it concluded that Australian water reform is at a 'crossroads'.[139] It explained that 'many reform gains are now taken for granted' and that the 'multi-party support' that had been crucial to the success of the NWI was 'at risk of breaking down'.[140] The Chair noted that the combined impact of improved water availability and institutional change may operate to jeopardise the future of water reform in Australia, as water as a policy issue now 'has less presence on the national political agenda'.[141] She argued that in light of the removal of various key water institutions, both water management generally and the NWI specifically would 'no longer have a clear position within the COAG forum'. [142] However, despite the removal of the NWC, independent monitoring of the implementation of the Basin Plan and the operation of the *Water Act* will continue. For instance, in 2014 an Independent Review of the *Water Act* was conducted by an expert panel, which held consultations and received public submissions on the operation of the Act. The panel concluded that whilst significant achievements have been made in relation to the implementation of the Basin Plan, 'there is still much to do to ensure that it is implemented in full and on time by 1 July 2019'.[143]

---

[136] National Water Commission, Submission No 6 to Senate Environment and Communications Legislation Committee, Parliament of Australia, *Inquiry into National Water Commission (Abolition) Bill 2014* 13 October 2014, 5.
[137] Ibid.
[138] Ibid.
[139] National Water Commission, *Australia's Water Blueprint: National Reform Assessment 2014* (2014) [1.2] <http://www.nwc.gov.au/publications/topic/assessments/australias-water-blueprint-national-reform-assessment-2014>.
[140] Ibid.
[141] National Water Commission, above n 136, 4.
[142] Ibid.
[143] Commonwealth of Australia, *Report of the Independent Review of the Water Act 2007, Commonwealth of Australia 2014* (2014), 9 <http://www.environment.gov.au/system/files/independent-review-water-act-2007.pdf>. 1st July 2019 is the date at which the SDLs come into effect. For the Government's response to the Review, see: Australian Government Department of Agriculture and Water Resources, *Report of the Independent Review of the Water Act 2007 Australian Government Response* (2015)

2.5.5 Water quality and pollution management in the MDB

2.5.5.1 Water quality and pollution issues in the MDB

There are two main types of water pollution in Australia; point source and non-point source ('diffuse') water pollution.[144] As the name suggests, point source water pollution refers to pollution which can be traced to an identifiable location/point (such as industrial waste from a pipe), and diffuse source water pollution refers to pollution which enters waterways from various 'points' (such as agricultural run-off).[145] Legal regulation of water pollution in Australia adopts this distinction by establishing distinct regimes for the regulation of each source type. Up until recent decades, focus was predominantly placed on the regulation of 'point source' water pollution.[146] Not only is the source of this pollution easier to identify and therefore regulate, but it was also traditionally the more significant water pollution problem. However, increasingly 'diffuse' source water pollution has gained significance, both in terms of impact on the environment and as a policy priority for water management. Throughout the MDB, diffuse source water pollution is a significant issue, particularly in relation to excessive salts, nutrients and sediments.[147]

The sources of diffuse water pollution are linked to land-use and consumptive water use. According to the latest edition of the Australian Bureau of Statistic's *Water Account Australia*, agriculture continues to consume the largest volume of Australia's water (52% in 2009-2010).[148] Due to the quantity of water used by the agricultural industry in Australia, and the impacts of agriculture on land and the hydrological cycle, agriculture has a very significant impact on both the quantity *and quality* of Australia's water resources. Key impacts include agricultural run-off, nutrient enrichment and chemical contamination,[149]

<http://www.environment.gov.au/system/files/resources/6b4a93b6-e3ac-4efa-8b10-f16dbe1a4d45/files/government-response-water-act-review.pdf>.

[144] Some parts of this section contain material published in Meg Good, 'Water Pollution: Treated Seriously, or Seriously in Need of Treatment?' (2014) 113 *Precedent* 23.

[145] Department of Environment and Resource Management (QLD), *Caring for our water* (2012) <http://www.derm.qld.gov.au/environmental_management/water/caring_for_our_water/index.html#managing_water_quality>.

[146] Rebecca Nelson, 'Regulating Nonpoint Source Pollution in the US: A Regulatory Theory Approach to Lessons and Research Paths for Australia' (2011) 35 *University of Western Australia Law Review* 340, 341.

[147] Murray-Darling Basin Authority, *Water Quality* <http://www.mdba.gov.au/basin-plan-roll-out/water-quality-and-salinity>.

[148] Australian Bureau of Statistics, *Water Account Australia 2009-2010* (2011) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/CAE301277A675941CA257956000E646E?opendocument>.

[149] Agriculture and Resource Management Council of Australia and New Zealand and Australian and New Zealand Environment and Conservation Council, *Rural Land Uses and Water Quality: A Community*

which can affect the quality of both surface water and groundwater resources.[150] These problems are difficult to manage as they are created by the cumulative actions of numerous often non-identifiable individuals and entities. As the MDB is Australia's most crucial agricultural region, many of the Basin's diffuse source water pollution issues can be attributed to agricultural land use.[151] The following section considers the respective roles of the Commonwealth Government and the Basin state/territory governments in regulating water quality and pollution in the Basin.

2.5.5.2 Role of the Commonwealth

Management of water quality and water pollution in the MDB primarily occurs at the state/territory level. However, the Commonwealth does have a role to play in regulating water quality in the Basin. Under the *Water Act*, one of the stated 'purposes' for the Basin Plan (which are designed to further the 'objects' of the Act) is the requirement that the Plan must provide for 'Basin-wide environmental objectives for water-dependent ecosystems of the Murray-Darling Basin and water quality and salinity objectives'.[152] In order to ensure that the specified purposes are adequately implemented, the Act stipulates the mandatory content of the Plan. A number of the specified 'matters' for inclusion in the Plan impact on the regulation of water quality in the Basin.[153] However, the Act specifically states that 'the control of pollution' is one of the express matters which may not be dealt with directly by the Basin Plan.[154] Presumably this express exclusion was incorporated into the Act in order to ensure that the federal legislation did not intrude on pre-existing state-based arrangements for pollution control.

Despite this, the Commonwealth is not impotent in terms of addressing water pollution in the Basin. There is scope for the Commonwealth to address pollution impacts on water resources through Australia's principal environmental legislation, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act*'). The *EPBC Act*

Resource Document (2000) <http://www.environment.gov.au/water/publications/quality/pubs/rural-land-uses-paper9.pdf>.

[150] Ibid 19.

[151] See Schedule 10 of the Basin Plan which outlines the key causes of water quality degradation in the Basin.

[152] *Water Act 2007* (Cth), s 20 (c).

[153] Ibid s 22 (1).

[154] Section 22 (10) explains that 'a provision of the Basin Plan has no effect to the extent to which the provision directly regulates: (a) land use or planning in relation to land use; or (b) the management of natural resources (other than water resources); or (c) the control of pollution.'

provides for the protection of 'matters of national environmental significance' (MNES) through the establishment of a federal assessment and approval process. The Act defines a number of specific MNES, also known as 'triggers'. Water impacts can be considered where for instance, a proposed action may have a significant impact on Ramsar wetlands.[155] Recently, water resources were included as an additional MNES, creating a 'water trigger' limited to the 'impacts of proposed coal seam gas and large coal mining developments on water resources'.[156] The absence of a more generally applicable water trigger is partly due to the fact that the Act is limited to the regulation of those subject matters which can be supported under the external affairs power by reference to Australia's international environmental obligations,[157] and partly due to the fact that the states/territories are primarily responsible for environmental impact assessment, the management of water resources and pollution control.

Although the Commonwealth is increasingly becoming more involved with water management generally, addressing water pollution issues still remains predominantly within the domain of state/territory jurisdiction. The division of responsibilities between the two levels of government was outlined in the 1992 Intergovernmental Agreement on the Environment. Although the Agreement does 'not constitute a binding legal document',[158] it does set out the 'responsibilities and interests of the Commonwealth' in relation to 'national environmental matters'.[159] These responsibilities include 'facilitating the co-operative development of national environmental standards and guidelines'.[160] In 1997, these respective roles were further qualified by the Heads of Agreement on Commonwealth and

[155] As declared by the Minister to be a declared Ramsar wetland, or under Art 2 of the *Convention on Wetlands of International Importance especially as Waterfowl Habitat* (Ramsar Convention), opened for signature 2 February 1971, 996 UNTS 245 (entered into force 12 December 1975): Australian Government, *Wetlands of international importance (Ramsar wetlands)* (2011) <http://www.environment.gov.au/epbc/protect/wetlands.html>.
[156] Department of the Environment (Cth), *Water Resources – 2013 EPBC Act Amendment – Water Trigger* <http://www.environment.gov.au/epbc/what-is-protected/water-resources>.
[157] As explained by Gerry Bates (above n 4, 80), the EPBC Act must 'reflect appropriate means of, and be adapted to' the numerous international treaties it relies upon: *Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 23 November 1972, 1037 UNTS 151 (entered into force 15 December 1975); *Convention on Wetlands of International Importance especially as Waterfowl Habitat* (Ramsar Convention), opened for signature 2 February 1971, 996 UNTS 245 (entered into force 12 December 1975); *Convention on the Conservation of Migratory Species of Wild Animals*, opened for signature 23 June 1979, 1651 UNTS 333 (entered into force 1 November 1983); *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975).
[158] Bates, ibid.
[159] Australian Government, *Intergovernmental Agreement on the Environment* (1992) [2.2.1].
[160] Ibid [2.2.1 (iii)].

State roles and responsibilities for the Environment ('Heads of Agreement'), which inter alia clarified that the Commonwealth has an interest in the 'development of agreed strategies and programmes to prevent and ameliorate land and water degradation…'[161]

In keeping with these statements, in the context of water pollution policy the Commonwealth's role has primarily involved the development of national guidelines, standards and strategies and the provision of funding. Numerous policy initiatives are underway at the Federal level to address water pollution generally, and specifically in the MDB. As noted earlier, the principle national initiative with respect to water management is the 'National Water Initiative' (NWI).[162] The NWI has numerous objectives, including the overall objective of returning Australia's water resources to environmental health.[163] Accordingly, the NWI requires Australian governments to work cooperatively to achieve water reform goals, including those relevant to improving Australia's overall water quality standards, monitoring and outcomes.[164] The Initiative supports, and is supported by, a range of other relevant national water/environment initiatives, such as the National Water Quality Management Strategy ('NWQMS') and Caring for our Country.[165]

The NWQMS is a national strategy consisting of national water policy objectives, the establishment of a process for developing management plans for water resource areas, and the development of water quality guidelines.[166] Under the 'auspices' of the NWQMS, a set of national water quality guidelines were developed - the Australian and New Zealand Guidelines for Fresh and Marine Water Quality ('Water Quality Guidelines').[167] As explained by the Australian and New Zealand Environment and

[161] Council of Australian Governments, *Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment* (1997) [28].
[162] Commonwealth of Australia, *Intergovernmental Agreement on a National Water Initiative* (2004) <http://www.nwc.gov.au/__data/assets/pdf_file/0019/18208/Intergovernmental-Agreement-on-a-national-water-initiative2.pdf>.
[163] Ibid.
[164] Under the NWI, the Federal and state/territory governments are required to submit implementation plans which detail how they intend to implement the Initiative.
[165] Australian Government, *Caring for our Country* (2012) <http://www.nrm.gov.au/>.
[166] Department of the Environment (Cth), *National Water Quality Management Strategy* (2012) <http://www.environment.gov.au/water/policy-programs/nwqms/index.html>.
[167] Australian and New Zealand Environment and Conservation Council and Agriculture and Resource Management Council of Australia and New Zealand, *An Introduction to the Australian and New Zealand Guidelines for Fresh and Marine Water Quality* (2000) <http://www.environment.gov.au/water/publications/quality/pubs/nwqms-intro-4a.pdf>.

Conservation Council and Agriculture and Resource Management Council of Australia and New Zealand, the 'guidelines are not mandatory, nor should they be regarded as such'.[168] Rather, the Water Quality Guidelines 'provide recommendations that water managers can use to guide practice and formulate policy', whilst still enabling states/territories to adopt protective measures adapted to the needs and requirements of their own jurisdictions.[169]

The Caring for Our Country initiative (mentioned above) replaced a previous national water initiative – the National Action Plan for Salinity and Water Quality ('NAPSWQ').[170] An assessment of the factors that led to the relative failure of the NAPSWQ concluded that numerous issues that contributed to its failure have not 'been adequately addressed' by its replacement Caring for Our Country.[171] As the program is still in its early stages, it is difficult to assess its effectiveness in overcoming these challenges. Overall, at the national policy level the Commonwealth has tended to focus on water quantity and availability issues, rather than water quality/pollution issues (as is evident in the focus of the COAG water reform agenda).[172] However, the *Water Act* represents a significant reform in this regard, as the Act requires the development of a Water Quality and Salinity Management Plan ('WQSMP') under the Basin Plan. The WQSMP is guided by the principles of ESD, and is intended to build on the NWQMS and the Basin Salinity Management Strategy.[173] It outlines the key causes of water quality degradation in the Basin, sets water quality objectives for Basin water resources and establishes water quality targets.[174]

The national policies and plans discussed in this section encourage and facilitate consistency between jurisdictions and provide state/territory governments with crucial policy guidance. However, national policies and guidelines have to be interpreted and applied within the contexts of the broader land use, environment and resource planning regimes established

[168] Ibid 4.
[169] Ibid.
[170] Australian Government, *National Action Plan for Salinity and Water Quality Archive* (2008) <http://www.napswq.gov.au/napswq/index.html>.
[171] David J Pannell and Anna M Roberts, 'Australia's National Action Plan for Salinity and Water Quality: a Retrospective Assessment' (2010) 54 *Australian Journal of Agricultural and Resource Economics* 437, 454.
[172] Council of Australian Governments Standing Council on Environment and Water, *COAG Standing Council on Environment and Water Terms of Reference* (2012) <http://www.scew.gov.au/publications/pubs/coag-standing-council-on-environment-and-water-terms-of-reference.pdf>.
[173] Murray-Darling Basin Authority, *Water Quality and Salinity Management Plan* (2011) <http://www.mdba.gov.au/sites/default/files/archived/proposed/FS_WQSMP.pdf>.
[174] *Basin Plan 2012* (Cth), Ch 9.

under state/territory jurisdictions. Accordingly, the effectiveness of these policies is not only contingent upon the adequacy of their content, but also on the nature and extent of their implementation at the state/territory level.

2.5.5.3 State/territory water quality and pollution management in the MDB

As noted above, water quality and water pollution are primarily managed at the state/territory level. Each Australian State/Territory has established a statutory pollution control regime, which consist of a broad range of environmental, planning, land use, development and natural resource management laws and policies. Although the relevant government departments and agencies involved in pollution control regulation differ between the States, some form of environment protection authority operates in each jurisdiction. As explained by Romany Webb, environmental protection authorities in the states/territories 'have four key tools available to them to protect water quality and prevent pollution'. Namely, 'state environment protection policies', 'licensing controls over activities that may cause environmental harm', 'notices requiring persons to stop polluting or harming the environment, and/or remedy the environmental damage they have caused' and 'pollution offences'.[175] In recognition of the inevitability of some degree of water pollution, all of the regimes focus on pollution prevention and control, rather than attempting to eliminate water pollution completely.[176]

Although approaches to water pollution regulation and management differ between the Basin states/ACT, to gain an understanding of the general regulatory approach it is useful to examine one jurisdiction in particular detail. As the most populous Basin state, the jurisdiction of New South Wales (NSW) provides a suitable case study.

Regulation of water pollution in NSW

A range of authorities are responsible for responding to water pollution in NSW, including water corporations, local councils, Catchment Management Authorities and the

[175] Romany Webb, 'Water Quality' in Kate Stoeckel, Romany Webb, Luke Woodward and Amy Hankinson, *Australian Water Law* (Thomson Reuters, 2012) 531, 557.
[176] As noted by Lyster et al in the context of NSW's pollution regime: Rosemary Lyster, Zada Lipman, Nicola Franklin, Graeme Wiffen and Linda Pearson, *Environmental and Planning Law in New South Wales* (Federation Press, 2009), 478.

Environment Protection Authority (EPA).[177] The principal piece of legislation addressing pollution of the environment in NSW is the *Protection of the Environment Operations Act 1997* (NSW). In relation to the specific issue of water pollution, the Act imposes a general prohibition on the pollution of waters.[178] Unless one of the stipulated defences applies (for instance, if a polluter acted within the scope of a relevant licence), any person found in violation of the prohibition will be guilty of an offence and liable for significant financial penalties.[179] The Act establishes a licencing regime which essentially creates 'licences to pollute' under specified conditions. These licences may be revoked by the Minister if the licence holder is found guilty of a 'major pollution offence', as defined under the Act.[180]

In order to ensure that violations are identified and investigated, relevant authorities are granted various investigative powers under the Act, including powers to acquire information/records and search and entry powers.[181] The effectiveness of these powers for identifying and preventing water pollution is largely contingent on the extent of their utilisation by relevant authorities and the perception of their use by those the Act intends to regulate. However, identifying water pollution incidents is not the sole responsibility of the relevant authorities. Under the Act, there is a duty to notify relevant authorities of any 'pollution incident' which causes 'material harm to the environment'.[182] The Act stipulates the class of people who owe the duty to notify, such as the occupier of premises on which the pollution incident occurs.[183] It is an offence to breach the duty, punishable by significant financial penalties.[184] The imposition of this duty to notify supports the pollution management regime established by the Act as it provides relevant corporations and individuals with an incentive to notify authorities about pollution incidents which may be in contravention of the provisions of the Act. Indeed, the Act specifically states that the duty applies even where 'to do so might incriminate the person or make the person liable to a penalty'.[185] A range of penalties are provided for under the Act. As explained by the

[177] Office of Environment & Heritage (NSW), *Contacts for Water Pollution* <http://www.environment.nsw.gov.au/pollution/water.htm>.
[178] *Protection of the Environment Operations Act 1997* (NSW) s 120.
[179] Ibid s 123. Cases where such penalties have been applied, include: *EPA v Waste Recycling and Processing Corporation* (2006) 148 LGERA 299; *EPA v CSR Building Products Ltd* [2008] NSWLEC 224. Further cases are cited in Lyster et al, above n 176, 510 n 71.
[180] *Protection of the Environment Operations Act 1997* (NSW), s 82 (1).
[181] Ibid ss 190-210.
[182] Ibid s 147.
[183] Ibid s 148.
[184] Ibid s 152.
[185] Ibid s 153 (1).

Environmental Defender's Office (NSW), the Act 'contains three different enforcement mechanisms: pollution notices, criminal prosecutions and civil action.'[186]

The Department of Environment and Climate Change (NSW) notes that there 'is a long history of successful enforcement' of the Act.[187] Whilst not all jurisdictions in Australia have always enjoyed a similar enforcement record with their pollution control regimes, it is evident that the mere existence of such penalties can have a regulatory impact, even in the absence of completely adequate enforcement. This argument is supported by John Braithwaite's concept of a 'regulatory pyramid' which gradually escalates in seriousness, ranging from the use of persuasion at the bottom of the pyramid, to the prosecution of criminal offences at the top of the pyramid (to be used as a last resort or for extremely serious offences).[188] However, as argued by Rob White, '[t]he contingencies of the regulatory pyramid are such that there is a lack of a pyramid as such if the peak is never attained (that is, the 'big stick' is never or rarely used).'[189] According to Government reports, the EPA in NSW 'has averaged about 100 prosecutions per year for pollution offences' since its inception.[190] However, as noted by Lyster et al, there has been a 'decline in prosecutions for more serious offences' over recent years, with a corresponding 'large increase in penalty notices'. [191] Arguably this trend does not necessarily render the regulatory pyramid ineffective, as the regime has been in operation for over a decade now and therefore a culture of compliance has presumably developed.

There is also a role for civil society in the enforcement of water pollution laws. For example, under the *Protection of the Environment Operations Act 1997* (NSW), 'any person' may bring civil proceedings to 'remedy or restrain' breaches of the Act.[192] The broadening of standing in NSW is representative of a more general trend, which aims to empower the

[186] Environmental Defender's Office (NSW), *Water, Air and Noise Pollution* <http://www.edo.org.au/edonsw/site/factsh/fs04_1.php>.
[187] Department of Environment & Climate Change (NSW), *NSW Diffuse Source Water Pollution Strategy* (2009) 9 <http://www.environment.nsw.gov.au/resources/water/09085dswp.pdf>.
[188] Rob White, *Crimes Against Nature: Environmental Criminology and Ecological Justice* (Willan Publishing, 2008) 212. See also, John Braithwaite cited in Neil Gunningham and Darren Sinclair, 'Designing Smart Regulation' in Bridget M Hutter (ed), *A Reader in Environmental Law* (Oxford University Press, 1999) 305, 311.
[189] White, ibid, 229.
[190] Lyster et al, above n 176, 529.
[191] Ibid 530.
[192] *Protection of the Environment Operations Act 1997* (NSW) s 252 (1).

community to take on a more significant role in environmental law enforcement.[193] There are a variety of rationales for this development, including the argument put forward by Hon Justice Brian J Preston of the Land and Environment Court of NSW. He argues that '[i]n order for environmental laws to be effectively enforced, it is not sufficient to rely on public authorities to do the enforcing.' [194] This sentiment is shared by a broad range of commentators, and receives particular support from public interest environmental law organisations, such as the Australian Network of Environmental Defender's Offices (ANEDO).[195] Whilst it may be possible for environmental laws to be effectively enforced by public authorities alone, it is certainly beneficial to also enable community members and public interest organisations to aid the enforcement of water pollution laws. However, as noted by Roberts and Craig, the absence of a 'litigious culture in Australia' can limit the effectiveness of these sorts of provisions.[196]

Regulation of diffuse source pollution in NSW

Complementing NSW's regulation of point source water pollution, the State also has in place a regulatory regime for the control and management of diffuse source water pollution. The key policy document governing this area is the *NSW Diffuse Source Water Pollution Strategy* which was made in recognition of the fact that 'diffuse source water pollution remains one of the biggest challenges in improving water quality for government, industry and the community.'[197] The *Strategy* notes the complex array of initiatives, policies, bodies and strategies already in operation by numerous different authorities to address various aspects of diffuse water pollution. It identifies and discusses a number of 'impediments' currently impacting on the management of diffuse source water pollution, including the need to provide adequate resources/skills/expertise, and the need for 'greater coordination between different industry groups and government'.[198] In contrast to the regulation of point source

[193] However, as noted by Hon Justice Brian J Preston, in the absence of a 'statutory standing provision, the person needs to establish standing under the common law test': Justice Brian J Preston, 'Enforcement of Environmental and Planning Laws in New South Wales' (Paper presented at the Law and Sustainability Symposium, University of Southern Queensland Law School, Brisbane, 11 March 2011) 9 <http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Enforcement_of_Environmental_and_Planning_Laws_in_New_South_Wales_v_2_(Lawbook_Co_citation_style).pdf/$file/Enforcement_of_Environmental_and_Planning_Laws_in_New_South_Wales_v_2_(Lawbook_Co_citation_style).pdf>.
[194] Ibid 2.
[195] Australian Network of Environmental Defender's Offices, *About Us* <http://www.edo.org.au/>.
[196] A M Roberts and R K Craig, 'Regulatory Reform Requirements to Address Diffuse Source Water Quality Problems in Australia: Learning from US Experiences' (2014) 21 (1) *Australasian Journal of Environmental Management* 1, 4.
[197] Department of Environment & Climate Change (NSW), above n 187.
[198] Ibid 9.

water pollution, the *Strategy* emphasises the fact that the management of diffuse source water pollution is an area 'where standards and norms are not yet well established'.[199] In recognition of the 'complex temporal and spatial interaction of multiple pollutants from multiple sources', the *Strategy* establishes a Priority Action Plan (PAP) which focuses on 'minimising pollutant loads at the *source* by focusing on land uses and related management practices' (emphasis added).[200]

The serious issue of groundwater pollution is also being addressed. The *State Groundwater Policy* is the key groundwater policy in NSW which operates within the general legislative framework which regulates impacts on groundwater.[201] The *Policy* incorporates a variety of more specific groundwater policies, such as the *Groundwater Quality Protection Policy*.[202] The *Groundwater Quality Protection Policy* furthers the aims of broader state natural resource management goals, such as the state target of improving groundwater quality by 2015. [203] Importantly, the *Policy* adopts an 'integrated approach to groundwater management', which requires that 'groundwater issues must be considered in relation to surface water management and land use planning decisions.' [204] This is important as it recognises the reality of the hydrological cycle by encouraging policy to avoid artificially compartmentalising different elements of the water cycle (i.e. surface water, groundwater, etc…) and regulating different pollution types (i.e. land/water/air pollution) under separate regimes. This approach is representative of a broader trend towards acknowledgment of the inter-dependency of natural systems in the design of pollution regulation.[205] A trend which has manifested in increasing integration of the concept of 'integrated natural resource management' and the associated concept of 'integrated catchment management'.[206] In NSW,

[199] Ibid 10.
[200] Ibid 10.
[201] Relevant state legislation includes the *Water Management Act 2000* (NSW), the *Environmental Planning and Assessment Act 1979* (NSW), *Protection of the Environment Operations Act 1997* (NSW), *Local Government Act 1993* (NSW) and the *Contaminated Land Management Act 1997* (NSW). Environmental Defender's Office (NSW), *Technical Fact Sheet: Groundwater* <http://www.edo.org.au/edonsw/site/factsh/fs05_6.php#10>.
[202] Department of Land & Water Conservation (NSW), *The NSW Groundwater Quality Protection Policy: A Component Policy of the NSW State Groundwater Policy* (1998) <http://www.water.nsw.gov.au%2FArticleDocuments%2F34%2Fnsw_state_groundwater_quality_policy.pdf.aspx&ei=sHm7T862M46iiAeLhf2ICQ&usg=AFQjCNEVVQEkHwD7TZfKxIuOLmch1pHzKg>.
[203] Ibid.
[204] Ibid 14.
[205] Bridget M Hutter, 'Socio-legal Perspectives on Environmental Law: An Overview' in Bridget M Hutter (ed), *A Reader in Environmental Law* (Oxford University Press, 1999) 3, 28.
[206] For a discussion of ICM in Australia, see Jennifer Bellamy, Helen Ross, Sarah Ewing and Tony Meppem, *Integrated Catchment Management: Learning from the Australian Experience for the Murray-Darling Basin:*

Catchment Management Authorities (CMAs) created under the *Catchment Management Authorities Act 2003* (NSW) have been established to pursue the goals of integrated natural resource management.[207] This move towards integrated catchment management has occurred across Australia, and constitutes a positive development for water pollution regulation.

2.5.5.4 Monitoring and reporting on water quality in the MDB

Critical to the successful implementation of the water quality and pollution laws and policies at both the Commonwealth and state/territory levels, is the establishment of adequate and effective water quality monitoring and pollutant monitoring systems. At the Commonwealth level in relation to the Basin Plan, the MDBA, Commonwealth Environmental Water Office and the Department of the Environment are all responsible for monitoring and evaluation of Basin water resources.[208] Monitoring and reporting guidelines have also been developed under the NWQMS. The Australian Guidelines for Water Quality Monitoring and Reporting ('Monitoring Guidelines') acknowledge that '[w]ater quality guidelines and standards can only be developed with data from monitoring'.[209] As with the Water Quality Guidelines discussed above, the Monitoring Guidelines are not 'prescriptive'.[210] They are intended to provide an outline of 'approaches and attitudes that have been shown to be effective in water quality monitoring'.[211]

However, as noted in the Australian Natural Resources Atlas, comprehensive water quality monitoring is complicated and resource intensive. Despite an annual investment of approximately $150 million, 'water quality monitoring in Australia, has a limited ability to assess and report on the status of Australia's surface waters'.[212] Due to the limitations of water quality monitoring, it is important that adequate information is recorded about the

Overview Report (2002) <http://www2.mdbc.gov.au/__data/page/911/ICM_Learning_from_Australian_Experience.pdf>.

[207] Lyster et al, above n 176, 332.

[208] Murray-Darling Basin Authority, *Monitoring and Evaluation* <http://www.mdba.gov.au/basin-plan-roll-out/monitoring-evaluation>.

[209] Australian and New Zealand Environment and Conservation Council and Agriculture and Resource Management Council of Australia and New Zealand, *Australian Guidelines for Water Quality Monitoring and Reporting: Summary* (2000) 3 <http://www.environment.gov.au/water/publications/quality/pubs/nwqms-monitoring-reporting-summary.pdf>.

[210] Ibid 4.

[211] Ibid.

[212] Australian Government, *Water resources – Quality*, Australian Natural Resources Atlas <http://www.anra.gov.au/topics/water/quality/index.html>.

sources and levels of pollutants entering Australia's waterways. In order to address this issue, the Australian Government has implemented a national internet database called the 'National Pollutant Inventory' (NPI) which provides information about the emissions of 93 types of pollutant into the Australian environment.[213] The NPI divides data into information about point source emissions (derived from data provided from relevant industries), and information about non-point source emissions (derived from government data). The database is a useful source of information on water pollution in Australia, providing the public, industry and government with an important overview of the concentrations, distribution and sources of a range of significant pollutants.

However, whilst the NPI is a useful regulatory tool, it does suffer from a few shortcomings. One shortcoming relates to the legal status of the NPI. The Inventory was established as a 'National Environment Protection Measure' (NEPM) by a legislative instrument made under the *National Environment Protection Council Act 1994* (Cth) (and corresponding State/Territory legislation).[214] As the NPI is an NEPM, it has 'no direct regulatory control over industry or individuals', and there are 'no sanctions for non-compliance'.[215] Whilst this shortcoming does not render the NPI ineffective, it does mean that the NPI's utility and relevance is dependent upon the continued cooperation of relevant stakeholders.

The scope of the NPI is also potentially problematic. The NPI is not comprehensive as it does not cover all pollutants entering Australia's waterways. Given the ever increasing list of pollutants threatening the health of water resources, it would be desirable to ensure that the only national inventory of pollutants entering the Australian environment is comprehensive. A further shortcoming of the NPI relates to the legal status of information provided for the purposes of reporting to the Inventory. If information supplied under the NPI reveals that the business/organisation in question is in breach of legal obligations imposed under state/territory law, the information submitted to the NPI may not be used as 'evidence' for the purposes of any 'court proceedings'.[216] Presumably this provision was incorporated to encourage honest reporting, a rationale which furthers the underlying

[213] Department of the Environment (Cth), *About the NPI* <http://www.npi.gov.au/npi/index.html>.
[214] *National Environment Protection (National Pollutant Inventory) Measure 1998* (Cth) made under s 14 (1) of the *National Environment Protection Council Act 1994* (Cth).
[215] Lyster et al, above n 176, 478.
[216] *National Environment Protection (National Pollutant Inventory) Measure 1998* (Cth) s 26 (1).

purpose of the NPI. However, it is arguably unfortunate that this may come at the expense of ensuring an adequate response to infringements of the law.

Civil society also has a role to play in monitoring and reporting on water quality and pollution in the MDB. Civil society performs a number of functions including water quality monitoring, water pollution reporting, environmental law enforcement, raising awareness of water pollution and implementing measures to reduce water pollution. As noted in the Australian Guidelines for Water Quality Monitoring and Reporting, 'community monitoring of water quality occurs throughout Australia'.[217] Community participation in water quality monitoring both complements and acts as a 'check' upon government monitoring, through programs such as 'Waterwatch'.[218] However, the ability of community programs to perform these functions is contingent upon the degree of community involvement, and the response of government to community input.

At present, Waterwatch has over 50 000 volunteers involved in the program, and has received significant support from the government.[219] A 2005 review of community based monitoring in a region of South Australia highlighted the benefits and challenges associated with community based water monitoring.[220] The main challenges reported, included 'the difficulty of renewing the membership and enthusiasm of community groups and the risk of losing experienced and capable participants and project officers'. [221] Despite these challenges, it is clear that community participation in water monitoring has discernible benefits (such as raising awareness) for ensuring the health of Australia's waterways.

[217] Australian and New Zealand Environment and Conservation Council and Agriculture and Resource Management Council of Australia and New Zealand, above n 209, 3.
[218] Australian Government, *About Waterwatch Australia* <http://www.waterwatch.org.au/about.html>.
[219] Ibid.
[220] Patrick O'Connor, Paul Dalby and Annie Bond, *A Review of Community Based Monitoring in the South Australian Murray-Darling Basin* (2005) SA Murray-Darling Basin Integrated Natural Resource Management Group Inc <http://www.samdbnrm.sa.gov.au/Portals/9/PDF's/People/Review%20of%20Community%20Based%20NRM%20Monitoring%20SAMDB.pdf>.
[221] Ibid.

2.6 Challenges facing environmental protection in the Australian water management context

As demonstrated by the foregoing discussion, there are various challenges facing environmental protection in the water management context in the MDB. All of the identified economic, political, social and legal challenges facing environmental protection generally are evident to some extent in this context. This section outlines some key challenges facing sustainable water management and the regulation of water quality and water pollution in the Basin.

2.6.1 Challenges for achieving sustainable water management in the MDB

As can be seen from the preceding discussion, there is a complex legal and policy framework in place to provide for sustainable water resources management in the MDB. At the Commonwealth level, the *Water Act* recognises the importance of sustainability considerations for planning and decision-making in relation to the Murray-Darling Basin's water resources.[222] However, despite significant reform over the past few decades, the Basin continues to face a wide range of water management challenges impeding the achievement of sustainability. Conflicting political interests and a history of over-allocation continue to delay the progress of crucial water reforms. As articulated by the current Chair of the MDBA, ongoing challenges include; 'multiple layers of overlapping jurisdictions', 'competing regulatory frameworks', 'opposing political imperatives' and 'ever-increasing community expectations'.[223]

In 2015, a Select Committee on the Murray-Darling Basin Plan was formed to 'inquire on the social, economic and environmental impacts' of the Plan on regional Basin communities.[224] Although the Committee is yet to report, hundreds of submissions have

[222] As explained by Gardner, Bartlett and Gray, whilst the Act 'does not expressly refer to 'ecologically sustainable development'', it does incorporate ESD considerations through other mechanisms. State/territory water resources management legislation in each of the Basin jurisdictions also recognises the importance of ensuring the sustainability of the resource for the future. However, as noted by Gardner, Bartlett and Gray, 'only the objectives of the South Australian Act contain an unqualified substantive objective of ecologically sustainable development': Alex Gardner, Richard Bartlett and Janice Gray, *Water Resources Law* (LexisNexis Butterworths, 2009), 51.

[223] Craig Knowles, 'Sustainable Development and Climate Change: Practical Solutions in the Energy-Water Nexus' (Speech delivered at the UN General Assembly – Thematic Debate, New York, 16 May 2013) 2 <http://www.un.org/en/ga/president/67/issues/climatechange/Panellists/Craig%20Knowles%20Speech%20to%20PGA%20Debate%2016%20May%202013.pdf>.

[224] Select Committee on the Murray-Darling Basin Plan, Parliament of Australia, *Inquiry into the Murray-Darling Basin Plan* (2015).

been received from individuals and organisations involved in the management of the MDB. According to the MDBA's submission, 'implementation by Commonwealth and state agencies is on track',[225] and reforms are already delivering environmental benefits.[226] However, various submissions questioned the design and implementation of the Plan. For instance, the NSW Farmers' Association submitted ten recommendations for reform, including urging immediate 'discussion of scenarios where there may be alternatives to achieving environmental outcomes without removing productive water from the basin'.[227] The Association argued that it 'is undeniable that removing productive water from businesses and from communities' will have a 'large' impact on regional communities.[228]

The Australian Conservation Foundation and Environment Victoria in comparison contended that 'overall, the evidence to date suggests that the actual impacts of the Plan on irrigation-dependent communities are relatively small'.[229] These divergent perspectives are representative of a broader divide between relevant stakeholders in the Basin concerning the appropriate balance to be achieved between social, economic and environmental factors. Further debate exists as to the appropriate means of achieving this balance. Finding a way to address the interests and concerns of all relevant stakeholders, whilst pursuing the overarching aim of returning the Basin to ecological health constitutes arguably the most significant legal and policy challenge in the MDB.

2.6.2 Challenges for the regulation of water quality and water pollution in the MDB

Improving the quality of Basin water resources has been a key priority of water reforms in the MDB. It is clear that whilst there are various systems at the Commonwealth and state/territory levels for ensuring adequate standards of water quality and water ecosystem health in the Basin, there are continuing challenges to address. Traditional command and control approaches have proven to be effective for addressing certain water pollution and quality issues. However, they have proven to be limited in regards to other issues, such as

[225] Murray-Darling Basin Authority, Submission 243 to Select Committee on the Murray-Darling Basin Plan, Parliament of Australia, *Inquiry into the Murray-Darling Basin Plan*, 25 September 2015, 2.
[226] Ibid 31.
[227] NSW Farmers' Federation, Submission 289 to Select Committee on the Murray-Darling Basin Plan, Parliament of Australia, *Inquiry into the Murray-Darling Basin Plan*, September 2015, 2.
[228] Ibid 9.
[229] Australian Conservation Foundation and Environment Victoria, Submission 147 to Select Committee on the Murray-Darling Basin Plan, Parliament of Australia, *Inquiry into the Murray-Darling Basin Plan*, September 2015, 10.

addressing diffuse source water pollution. As noted by Neil Gunningham and Darren Sinclair, '…while 'first generation' water pollution problems caused by major point sources are now largely under control, far more complex challenges are posed by 'second generation' problems including, in particular, diffuse pollution (also called non-point source pollution)'.[230] The comparative regulatory success of point source pollution, vis a vis diffuse source pollution has led one commentator to characterise non-point source pollution as 'the unfinished business of water quality regulation in Australia.'[231] Jurisdictions around the world have grappled with the problem of regulating diffuse source water pollution, which presents unique challenges which can not be adequately managed using regulatory mechanisms designed for point source pollution.[232]

In line with Gunningham and Sinclair's earlier work relating to 'smart regulation', they explored a range of potential policy options for addressing diffuse source water pollution from agriculture. One potential option they explored related to the use of 'nutrient management plans' (NMPs), which are currently in use in a number of overseas jurisdictions.[233] NMPs can be defined as plans which 'assist in quantifying the mass balance of nutrients produced and utilised on-farm, and in identifying potential risks of nutrient losses to surface water, waterways or groundwater.'[234] Gunningham and Sinclair evaluated a range of potential implementation options, including the possibility of statutorily mandated NMPs.'[235] Requiring agricultural industries to develop and abide by NMPs, or similar compulsory land use management plans, can be politically difficult to realise, and practically difficult to enforce. Although policy recognition of the crucial link between land use and water quality has been achieved in Australia, arguably it has failed to fully translate into meaningful policy action to effectively address diffuse source water pollution. This failure can be attributed to a number of issues, including the current reliance on 'voluntarism' in diffuse source water pollution regulation.[236] As noted earlier, traditionally the

[230] Neil Gunningham and Darren Sinclair, 'Policy Instrument Choice and Diffuse Source Pollution' (2005) 17 (1) *Journal of Environmental Law* 51, 51.
[231] Nelson, above n 146, 384.
[232] Michelle Perez, *Regulating Farm Non-Point Source Pollution: The Inevitability of Regulatory Capture and Conflict of Interest?* (2011) 9 Stockholm International Water Institute <http://www.siwi.org/documents/Resources/Best/2010/2011_OTWF_Michelle_Perez.pdf>.
[233] Gunningham and Sinclair, above n 230, 60.
[234] Australian Pork Limited, *Sustainable Piggery Effluent Utilisation in Australian Farming Systems: Case studies on the development and implementation of Nutrient Management Plans at ten Australian piggeries* (2011) 3 <http://www.australianpork.com.au/pages/images/Nutrient%20Case%20Studies%20-%20Final%20design%20-%20web%20low%20res.pdf>.
[235] Gunningham and Sinclair, above n 230, 60.
[236] Ibid 54.

Commonwealth has not taken an active role in regulating diffuse source water pollution, preferring to leave the issue to state/territory regulation. Rebecca Nelson argues that this 'federal reluctance to regulate non-point sources aggressively' can be attributed to 'the link between nonpoint pollution and land use.'[237] Land use regulation, like water regulation and pollution regulation, has traditionally fallen within the ambit of state/territory regulation. Despite this, as noted above, under the Basin Plan addressing water quality and salinity issues has been made a priority issue. Although is not yet possible to predict whether this Commonwealth guidance is likely to be effective, it is certain that the management of diffuse source water pollution in the Basin will continue to pose a significant legal and policy challenge for years to come.

2.6.3 Room for new approaches

In recognition of the limited ability of traditional resource management and environmental protection approaches to ensure sustainable management of the MDB, new approaches have been trialled, including the adoption of market-based mechanisms. Whilst these mechanisms have enjoyed some success, there is certainly scope for the adoption of additional and alternative approaches to environmental protection in this context. Recent research exploring the achievements and limitations of cap and trade market-based instruments in the Australian water management context concluded that there have been various achievements, especially in the MDB.[238] However, the research also identified various 'flaws' which the authors argue 'require water law and policy to look beyond markets'.[239]

In particular, they argue that 'accounting for wider social impacts of markets remains a significant challenge', one which may be an inherently unavoidable limitation of market based mechanisms.[240] It is clear that market based mechanisms are not capable of comprehensively addressing the broad range of issues facing the MDB. In light of the limitations of market based mechanisms, it is worth considering the potential utility of rights-based approaches for addressing the identified challenges.

[237] Nelson, above n 146, 342.
[238] Cameron Holley and Darren Sinclair, 'Governing Water Markets: Achievements, Limitations and the Need for Regulatory Reform' (2016) 33 *Environmental and Planning Law Journal* 301, 320.
[239] Ibid, 301.
[240] Ibid, 322.

2.7 Conclusion

What are the current approaches to environmental protection in Australia? Have these approaches been successful in achieving ecologically sustainable development? What are some of the key environmental protection challenges facing Australia? What approaches to environmental protection have been adopted in the Murray-Darling Basin water management context, and how effective have they been?

The aim of this chapter was to outline the current systems for environmental management and protection in Australia, in order to identify whether there is scope for the consideration of new approaches. It also sought to define the concept of ecologically sustainable development, and to identify challenges currently facing environmental protection in Australia. It was explained that there are numerous challenges facing environmental protection, including economic, social, political and legal challenges. Whilst existing approaches to environmental protection have proven capable of addressing certain environmental problems, there has been an increasing move towards the adoption of new regulatory models in recognition of the changing nature of environmental issues.

As water resources management has been selected as the case study for the thesis, the chapter focussed specifically on the approach to environmental protection in a specific water management context, namely sustainable water management and water quality and pollution regulation in the Murray-Darling Basin. It was demonstrated that despite significant reforms over the past few decades, there are various challenges facing environmental protection in this context. In particular, the challenge of balancing competing interests in the Basin's water resources, and the challenges posed by complicated water quality problems (such as diffuse source water pollution). Having concluded that there is scope for adopting new approaches to environmental protection, the following chapter considers the possible utility of adopting rights-based approaches in Australia. Rather than viewing protection from environmental harm as a form of assistance granted by the state, rights-based approaches view environmental protection as a right owed by the state to its citizens. This conceptualisation of the human/environment relationship and the role of the state in the regulation of the relationship differs from existing approaches.

As explained, the dominant approach at present is the command and control approach, which has had success in regulating some more traditional environmental problems but is limited

in its ability to adequately regulate newer more complicated environmental issues. Although alternative approaches are already being adopted, there is still significant room for the adoption of new approaches to address continuing and complex environmental problems.

Chapter Three
The Environmental Rights Revolution and Australia

What is the environmental rights revolution, and why has it emerged? What are the types of environmental rights which have been recognised? Has Australia embraced the concept of environmental rights? If not, what are the possible factors explaining Australia's reluctance?

3.1 Introduction

Increasingly, jurisdictions around the world are looking beyond traditional legal approaches to environmental protection, and embracing the notion that human beings may possess certain fundamental 'environmental rights'. Although these rights differ in terms of their scope, content, nature, form and objectives, they mainly seek to recognise some form of human right to live in a healthy and clean natural environment. David R Boyd has labelled this legal and political trend the 'environmental rights revolution', which he explains has emerged partly as a result of a broader rights revolution around the world. He defines the rights revolution as the 'sustained, developmental process that has produced new rights or expanded existing rights, resulting in unprecedented recognition and protection of these rights and extension of rights to previously "right-less" groups'.[1] The environmental rights revolution can be viewed as both part of this more general international trend towards human rights recognition and practice, and as a response to increasing concern over the adequacy of existing approaches to environmental protection.

The aim of this chapter is to explore the nature of the environmental rights revolution, and to ascertain potential explanations for Australia's reluctance to embrace a rights-based approach to environmental protection. It outlines various types of environmental rights, including more ecocentric rights concepts. A number of possible factors explaining Australia's decision to eschew a rights-based approach to environmental protection are considered. These include the nature of the Australian legal and political system, the nature of Australian approaches to the protection of human rights and the environment, and the perception that current approaches to environmental protection are adequate. It is concluded that these factors do not constitute sufficient reasons to deny consideration of the potential benefits associated with the adoption of a rights-based approach in Australia. Accordingly,

[1] David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (UBC Press, 2012) 7.

subsequent chapters consider the possibilities for implementation of a specific rights-based approach to environmental protection in the Australian context.

3.2 Rights-based approaches to environmental protection

Boyd has methodically traced the march of the environmental rights revolution from its academic beginnings to formal legal recognition in numerous nation states. Through his extensive analysis of the nature and extent of its influence on legal systems, public opinion and environmental quality, he concluded that '...nations with constitutional provisions related to environmental protection have superior environmental records.'[2] Whilst this is a promising finding, it does not necessarily indicate that rights-based approaches to environmental protection are necessarily an effective tool for improving environmental health and achieving ecologically sustainable development. As noted by Boyd, '[f]urther research is required to substantiate these initial results and determine whether there is a cause-and-effect relationship.'[3] Jodoin supports the exercise of caution, and argues that 'further quantitative analysis is indeed required to control for the effect of many other confounding and intervening variables, such as the well-known influence of rising income levels on environmental performance.'[4]

Even if it is not possible to substantiate a cause and effect relationship between legal recognition of environmental rights and improved environmental protection, as Boyd advocates, legal recognition could at the very least be 'viewed as a useful additional tool for the societal actors engaged in the process of attempting to transform today's unsustainable societies.'[5] In support of this claim, his research reveals that legal recognition results in 'many of the anticipated benefits and few of the potential drawbacks forecast by legal experts'.[6] These benefits include, but are not limited to, 'providing an impetus for stronger legislation', 'bolstering the implementation and enforcement of existing environmental laws and policies', 'offering a safety net by filling gaps in environmental legislation' and 'protecting environmental laws and regulations from rollbacks under future governments.'[7] Despite evidence of these benefits manifesting in practice, Boyd is careful to qualify his claim that 'constitutional protection of the environment can be a powerful and potentially transformative step toward' the goal of ecologically sustainable development,[8] by

[2] Ibid 276.
[3] Ibid.
[4] Sebastien Jodoin, 'Should We Be So Positive About Environmental Rights: A Review of David R Boyd's The Environmental Rights Revolution' (2012-2013) 8 *McGill International Journal of Sustainable Development Law and Policy* 131, 138.
[5] Boyd, above n 1, 287.
[6] Ibid 251.
[7] Ibid 28.
[8] Ibid 3.

acknowledging that it should not be viewed as a 'silver-bullet for today's environmental problems'.[9] The utility of any legal approach to environmental protection must be viewed within the broader context of the myriad legal, political, social, economic and environmental challenges facing the achievement of sustainability. It would be unreasonable to expect any one approach to provide a solution to the large range of interrelated and complex environmental problems created by modern society. Indeed, some commentators argue that '[t]he challenges in overcoming unsustainability arguably go well beyond the empire of environmental law.'[10] Whilst some have called for broader social structural change, others have advocated for reforms 'within the system'. The environmental rights revolution represents an interesting compromise between these positions as it involves an important revision of the nature of the human/environment relationship, whilst utilising the existing legal/political architecture established by the human rights enterprise. As noted by Nickel, the 'human rights movement has strong international recognition, support and institutions…to offer environmentalism'.[11]

However, it is a matter of debate as to whether it offers a genuine alternative to existing approaches to environmental protection. For example, Boyd notes that 'there are experts who believe that a rights-based approach to environmental protection is the only effective alternative to today's market-based approach', which they claim 'is failing to adequately protect the environment'.[12] However, it is arguable whether rights-based and market-based mechanisms are necessarily alternatives. Market-based mechanisms may be utilised to fulfil the rights and responsibilities established by environmental rights. For example, an environmental tax could be utilised as a mechanism to reduce the emission of a pollutant, thus contributing to an improvement in environmental health and therefore potentially assisting in the fulfilment of the right to a healthy environment. There may however be tensions between the underlying values relied upon by these different approaches. Rights-based approaches conceptualise the human/environment relationship in terms of rights and

[9] Ibid 42.
[10] Richardson notes that evolutionary psychologists 'are helping to pinpoint some explanations in factors such as humankind's modest capacity for cooperation and altruism beyond our immediate familial and tribal affinities, as well as our cognitive biases against acting for the long-term.' Benjamin J Richardson, 'Book Review: The Right to a Healthy Environment: Revitalizing Canada's Constitution; The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment' (2013) 179 *British Columbia Quarterly* 241, 241.
[11] Nickel cited in Tim Hayward, *Constitutional Environmental Rights* (Oxford University Press, 2005), 11.
[12] David R Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (UBC Press, 2012) 35.

responsibilities, with human beings possessing a 'right' to some level of environmental health. It is possible that inconsistencies could be perceived between this conceptualisation of the relationship, and the market-based approach which views natural resources and the natural environment as being capable of constituting tradeable private human property.

Similarly, it is debatable whether rights-based approaches offer genuine alternative guiding principles and objectives for environmental protection. The most influential and prevalent concept guiding environmental protection over the past 30 years has been the concept of 'sustainable development'. As noted by Fisher, whilst it is not necessarily 'universally accepted, clear in concept or enforceable in practice' it is 'in one form or another…the fulcrum around which environmental law is evolving.'[13] Although the concept is notoriously difficult to define simply, accurately, and with universal agreement, the most well-known formulation hails from the 1987 Brundtland Report, which defined sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'[14] It is important to consider whether the aims of sustainable development differ sufficiently from the aims of rights-based approaches to constitute true alternatives to the status quo.

One potential point of distinction may lie in the way that rights-based approaches prioritise environmental protection considerations. Some critics argue that the concept of sustainable development is problematic on the grounds that it gives 'priority to development' over the environment.[15] As Dresner notes, the 'identification of sustainable development with the growth agenda has made radical environmentalists deeply suspicious of it.'[16] Accordingly, there are concerns that the concept does not adequately achieve the necessary balance between the various often competing interests it attempts to reconcile. It is possible that rights-based approaches could offer alternative guiding principles for environmental protection, which may better assist in achieving an adequate balance between environmental protection considerations and competing interests.

[13] Chris McGrath, *Does Environmental Law Work? How to Evaluate the Effectiveness of an Environmental Legal System* (Lambert Academic Publishing, 2010) 55.
[14] *Report of the World Commission on Environment and Development: Our Common* Future, UN Doc A/42/427 (1987) annex I.
[15] Simon Dresner summarising the views of Tim O'Riordan and Nitin Desai in Simon Dresner, *The Principles of Sustainability* (Earthscan, 2009) 71.
[16] Ibid.

3.3 Emergence of the Environmental Rights Revolution

As discussed above, the environmental rights revolution refers to a global trend towards legal recognition of rights relating to the human/environment relationship. Predominantly, these rights have been recognised in the form of constitutional rights. In order to understand why Australia has not joined this revolution, it is important to consider the factors motivating this global shift towards environmental rights recognition and advocacy.

Although there are undoubtedly myriad potential explanations for the global emergence of the environmental rights revolution, arguably the following four factors have played a significant role:

1. A perception that current methods for addressing the global decline in ecological health are inadequate;
2. An increasing disenchantment with traditional environmental law;
3. A desire to find a rationale for giving the interests of environmental protection increased prioritisation over potentially competing interests;
4. The popularity of the 'rights' discourse as a means of protecting fundamental interests.

Arguably, one of the main factors leading to the emergence of the environmental rights revolution is an increasing perception that current methods for addressing the global decline in ecological health are inadequate. Despite the existence of a plethora of international, regional and national regimes for environmental protection, environmental harm and ecological decline continue to persist. Understandably, this perception of ineffectiveness has contributed to a view that new and alternative approaches to environmental protection and regulation may be necessary. As explained above, it is possible that rights-based approaches may provide an avenue for giving the interests of environmental protection increased prioritisation over potentially competing interests. One possible way that rights-based approaches may facilitate increased prioritisation, is by operating as 'trumps' over other interests.[17] Rather than forcing environmental protection considerations to be balanced against competing interests, recognising that human beings have environmental rights may

[17] The concept of rights as 'trumps' has been advocated by Dworkin (explored below in Chapter Four): Dworkin cited in Denise Meyerson, *Jurisprudence* (Oxford University Press, 2010), 244.

help to ensure that these fundamental interests are capable of 'trumping' less fundamental interests. As noted by Shelton, rights-based approaches 'are preferred by many… because human rights are maximum claims on society, elevating concern for the environment above a mere policy choice that may be modified or discarded at will.' [18] She further argues that 'the moral weight afforded by the concept of rights as inherent attributes that must be respected in any well-ordered society exercises an important compliance pull.'[19] Weston and Bollier support this characterisation, explaining that the conceptualisation of rights as trumps acting as maximum claims on society, means that they are 'not matters of charity, a question of favour or kindness to be bestowed or taken away at pleasure'.[20] Rather, they argue that conceptualising rights in this way means that rights constitute 'values or goods deemed fundamental and universal'.[21] They qualify that although not 'absolute', these rights are 'superior to other claimed values or goods'.[22] In other words, rather than the standard of environmental protection being determined as a matter of choice as a product of a cost/benefit analysis taking into consideration competing interests, the standard would have to be determined taking into consideration, as a matter of fundamental importance, the state's duty to respect environmental rights.

However, the ability of rights to act as 'trumps' over other interests is contingent upon the political and legal context in which they are intended to operate. For instance, various developing nations have broad rights guarantees in their domestic law, yet significant rights breaches in practice. Even in countries with strong legal and political institutions, legal recognition of a right does not necessarily guarantee its protection and fulfilment. Boyd notes the continuance of racism and sexism in Canada, despite constitutional rights to equality as a prime example.[23] However, he argues that 'it is incontrovertible that rights have contributed to some amelioration of the wrongs they are intended to address.'[24] Experience with human rights recognition and implementation in the decades since the recognition of the *Universal Declaration of Human Rights* demonstrates that acknowledging and

[18] Dinah L Shelton (ed), *Human Rights and the Environment Volume I* (Edward Elgar, 2011) x.
[19] Ibid. See also: Dinah Shelton, 'Equitable Utilization of the Atmosphere: a Rights-Based Approach to Climate Change?' in Stephen Humphreys (ed), *Human Rights and Climate Change* (Cambridge University Press, 2010) 91, 121.
[20] Burns H Weston and David Bollier, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons* (Cambridge University Press, 2013), 89.
[21] Ibid.
[22] Ibid.
[23] Boyd, above n 12, 35.
[24] Ibid.

implementing rights can have significant impacts on human attitudes, behaviour and legal systems. Accordingly, the popularity of the rights discourse as a means of protecting fundamental interests is understandable, and may help to explain why an increased perception of environmental protection failure has led to increased environmental rights recognition.

From the above discussion, it can be seen that there are numerous potential factors contributing to the emergence of the environmental rights revolution. In order to better understand the nature of this revolution, it is important to appreciate the different types of environmental rights which have been implemented in jurisdictions across the world.

3.4 Types of environmental rights

Environmental rights refer broadly to moral, political and legal rights which govern the relationship between humans and the natural environment. They can be divided into two main categories; rights possessed by human beings (environmental human rights), and rights possessed by natural entities (rights of nature).

3.4.1 Environmental human rights

Environmental human rights refer to human rights which govern the human/environment relationship.[25] Accordingly, they fall under the umbrella of human rights law. Under international human rights law, a distinction is drawn between civil and political rights ('CP rights') and economic, social and cultural rights ('ESC rights'). There are also categories referred to as 'generations' of rights, with three generations consisting of 'first generation' rights (CP rights), 'second generation' rights (ESC rights) and 'third generation' rights (a broad group of often contested rights).[26] Environmental human rights exist across all three generations, and as noted by Alan Boyle, 'do not fit neatly into any single category.'[27] He argues that they 'can be viewed from at least three perspectives, straddling all the various categories or generations of human rights.'[28] The following section will consider each of these types in turn, assessing their relative potential benefits and challenges for environmental protection.

3.4.1.1 First generation human rights

There are various civil and political rights of relevance to the human/environment relationship. Although these rights do not have protection of the environment as their central aim, in keeping with the interrelated and interdependent nature of human rights, their recognition can impact on the human/environment relationship. For example, as noted by Boyle, '…existing civil and political rights can be used to give individuals, groups and

[25] Environmental human rights can be distinguished from 'ecological rights'. As explained by Taylor, ecological rights are 'human rights which are subject to certain limitations'. Taylor explains that '[t]hese limitations recognize that individual freedoms are exercised in an ecological context, in addition to a social context': Prudence E Taylor, 'From Environmental to Ecological Human Rights: A New Dynamic in International Law?' (1997-1998) 10 (2) *Georgetown International Environmental Law Review* 309, 309.
[26] Li-Ann Thio, 'The Universal Declaration of Human Rights at 60: Universality, Indivisibility and the Three Generations of Human Rights' (2009) 21 (1) *Singapore Academy of Law Journal* 293, 305.
[27] Alan Boyle, 'Human Rights and the Environment: A Reassessment' (2010) 1 <http://www.unep.org/environmentalgovernance/Portals/8/documents/Events/HumanRightsEnvironmentRev.pdf>.
[28] Ibid.

NGOs access to environmental information, judicial remedies and political processes.'[29] Ensuring adequate facilitation of these procedural guarantees, is in many ways a prerequisite to being able to fulfil substantive guarantees to a clean and healthy environment. An informed and politically empowered populace should, atleast theoretically, be more capable and motivated to encourage governments to uphold duties imposed by environmental rights. Boyle explains that CP rights can perform this 'empowerment' role by 'facilitating participation in environmental decision-making and compelling governments to meet minimum standards of protection for life, private life and property from environmental harm.'[30]

There are various benefits associated with utilising CP rights to pursue environmental protection goals. Firstly, it is undoubtedly less controversial to propose the 'greening' of existing human rights, than to propose the recognition of 'emerging' human rights. Accordingly, it is more likely that nation states will engage in legal recognition and practical implementation of CP rights. As CP rights are the most well accepted and widely recognised category of human rights, it is possible to utilise existing laws, regulations, policies and institutions to pursue the goals of environmental protection. As noted by Boyle, this approach 'avoids the need to define such notions as a satisfactory or decent environment', and in avoiding this definitional complexity also ensures that it 'falls well within the competence of human rights courts'.[31] However, both of these apparent benefits of an indirect approach to environmental protection through the fulfilment of CP rights, have associated disadvantages. Whilst avoiding defining the desired environmental standard sought to be achieved through rights recognition overcomes various political and institutional barriers, it does also pose a significant problem in terms of achieving environmental protection goals.

As noted by Boyle, it means that 'even those individuals who are victims of violations cannot ask a human rights court or the UN Human Rights Committee to decide in favour of environmental protection merely because they believe that is where the public interest is best served.'[32] Rather, they 'can only ask it to weigh their own rights against the public interest in some other value such as trade or development.'[33] He explains that whilst this process

[29] Ibid.
[30] Ibid.
[31] Ibid 33.
[32] Ibid 32.
[33] Ibid.

may achieve some benefits for environmental protection, 'these will be incidental consequences, not the result of any broader commitment to a particular kind of environment.'[34] Accordingly, whilst CP rights certainly have a role to play in environmental protection, they are not a sufficient mechanism by themselves. For this reason, it is important to consider the potential roles for second generation and third generation human rights.

3.4.1.2 Second generation human rights

Economic, social and cultural rights ('ESC rights') are related to, yet distinct from CP rights. Examples of ESC rights include the rights to education, health and an adequate standard of living.[35] They are intended to 'ensure the protection of people as full persons, based on a perspective in which people can enjoy rights, freedoms and social justice simultaneously.'[36] Although they do have a 'collective dimension', as with CP rights they are individual rights possessed by every human being. [37] However, unlike with most CP rights, 'the rights involved require positive action by States rather than, as in the case of the majority of civil and political rights, mere recognition of individual's rights and corresponding non-interference by the State.'[38] However, as noted by Danilo Türk, in order for states to fulfil the duties established by ESC rights, 'the people should be able to control and govern the State, which is only possible if civil and political rights are respected.'[39] This highlights the importance of recognising the fundamental interdependence and indivisibility of human rights.

In terms of utilising ESC rights as a means of improving environmental protection, it is increasingly being acknowledged that there may exist a human right to a healthy environment. This individual right can be conceptualised as both a derivative right of already internationally recognised ESC human rights (such as the right to an adequate standard of living and the right to health), and as an independent right. Boyle notes that the 'main argument for this approach is that it would privilege environmental quality as a value, giving

---

[34] Ibid.
[35] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
[36] Committee on Economic, Social and Cultural Rights, *Fact Sheet No.16 (Rev.1), The Committee on Economic, Social and Cultural Rights* (1991) 3 < http://www.ohchr.org/Documents/Publications/FactSheet16rev.1en.pdf >.
[37] United Nations Human Rights Office of the High Commissioner, *Can Each of Us Claim Economic, Social and Cultural Rights?* <http://www.ohchr.org/EN/Issues/ESCR/Pages/Caneachofusclaimeconomicsocialculturalrights.aspx>.
[38] Danilo Türk, Special Rapporteur, *The Realization of Economic, Social and Cultural Rights*, UN Doc E/CN.4/Sub.2/1992/16 (3 July 1992) [12].
[39] Ibid [19].

it comparable status to other economic and social rights such as development, and priority over non rights-based objectives.'[40] However, he warns that in raising the right to the status of other ESC rights, it leaves the right 'vulnerable to tradeoffs against other similarly privileged but competing objectives, including the right to economic development.'[41] Whilst this is an issue, arguably it is preferable to have the right considered in the balancing of competing rights as an equal ESC right, rather than not weighing into the balance at all.

3.4.1.3 Third generation human rights

Third generation rights differ from first and second generation rights, in both their nature and degree of acceptance. They are collective rights, addressing broad issue areas such as 'development, environment and peace'.[42] Downs explains that 'the goal of third generation human rights is to enhance and facilitate the fulfillment of first and second generation rights'.[43] Rather than recognising the human right to a healthy environment as an individual ESC right, it is possible to recognise the right to a healthy environment as a collective third generation right. Although this is the most controversial and least accepted version of the right, Boyle argues that it has numerous benefits over recognition of the right as an individual ESC right as it 'would benefit society as a whole, not just individual victims'.[44]

He also argues that it 'would enable litigants and NGOs to challenge environmentally destructive or unsustainable development on public interest grounds' and 'would give the environmental concerns greater weight in competition with other rights'.[45] Despite these potential benefits, due to the contested status of the third generation version of the right, and the practical complexities of its implementation, the individual ESC version of the right has been more widely adopted in domestic legal systems. Arguably, a number of the benefits outlined by Boyle could be realised through domestic legal recognition of an individual ESC version of the right (an issue which will be explored in Chapters Six and Seven).

[40] Boyle, above n 12.
[41] Ibid 2.
[42] Lucy Richardson, 'Economic, Social and Cultural Rights (and Beyond) in the UN Human Rights Council' (2015) 15 *Human Rights Law Review* 409, 411.
[43] Jennifer A Downs, 'A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right' (1993) 3 *Duke Journal of Comparative & International Law* 351, 358.
[44] Boyle, above n 27, 35.
[45] Ibid.

3.4.2 Rights of nature

The environmental rights revolution also encompasses more ecocentric conceptions of the human/environment relationship.[46] The rights of nature discourse advocates for a conceptualisation of this relationship as a relationship between rights-bearers. This body of thought is distinct from the human rights discourse, and challenges what one commentator has described as the 'hegemonic status' of human rights:

> Human rights discourse has assumed hegemonic status and is widely billed as "the only game in town" for environmental protection. Yet, many commentators have voiced serious concerns that a human rights model cannot address the root causes of environmental exploitation. To begin, the approach is overtly anthropocentric. Even the phrase "human rights and the environment" is species specific, focuses on "rights" which is an inherently individualistic concept and sets up an immediate dichotomy between the "human" and the "environment".[47]

Unlike the greening of existing human rights, or the recognition of a human right to a healthy environment, 'nature rights' perspectives involve a much more fundamental challenge to the status quo and the basic constitutive elements of modern societies. They represent a challenge to legal, political and economic systems based on the concepts of private property, capitalist accumulation of wealth and the power of corporations. Some of these approaches set the foundations for social change through legal reforms which recognise the 'rights' of nature as a whole, and of specific natural entities.[48] The discourse is based on the central claim that natural entities possess rights simply by virtue of their existence. One of the most well-known advocates of this position is Christopher Stone, who authored the seminal book, *Should Trees Have Standing?* Stone's thesis involves granting 'legal rights to forests, oceans, rivers, and so-called "natural objects" in the environment.'[49] He advocates for a 'guardianship approach', whereby natural entities would possess legal standing, exercisable through a human guardian.[50] Although suggesting the concept provoked significant academic debate, as noted by Stone himself, it 'had an impact on 'environmental law and ethics, quite out of proportion to its actual impact on the courts.'[51]

---

[46] Parts of this section have been published in Meg Good, 'The River as a Legal Person: Evaluating Nature Rights Approaches to Environmental Protection in Australia' (2013) 1 *National Environmental Law Review* 34.
[47] Peter Burdon, 'Environmental Protection and the Limits of Rights Talk' (2012) <http://rightnow.org.au/topics/environment/environmental-protection-and-the-limits-of-rights-talk/>.
[48] See generally, James A Nash, 'The Case for Biotic Rights' (1993) 18 *Yale Journal of International Law* 235; James L Huffman, 'Do Species and Nature Have Rights?' (1992) 13 *Public Land Law Review* 51.
[49] Christopher D Stone, *Should Trees Have Standing? Law, Morality, and the Environment* (Oxford University Press, 5th ed, 2010) 3.
[50] Ibid 18.
[51] Ibid xi.

However, despite the failure to attract widespread support, the concepts articulated by Stone are beginning to find favour in a handful of legal jurisdictions around the world. For example, in 2008, Ecuador recognised the rights of nature in its *Constitution* by acknowledging that nature has the 'right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution', and that humans have the corresponding right to 'demand the recognitions of rights for nature'.[52] Since its introduction, a few legal challenges have been raised utilising the new provisions, with one resulting in a success for nature rights advocates.[53] In 2011, an action was brought on behalf of an Ecuadorian river. The river had been polluted with the remnants of road construction. The court recognised the river's right to flow, and issued an injunction preventing further contamination, as well as remediation and other orders.[54]

Recognition of nature rights has also occurred in more developed nations, such as the United States of America (US) and New Zealand. In the US, the Community Environmental Legal Defence Fund (CELDF) has been assisting local communities to establish 'Community Bills of Rights' which assert the 'right to local self-governance' in jurisdictions across America.[55] These rights declarations additionally recognise 'the right to clean air and water, sustainable energy, sustainable food systems, and the rights of nature', and specifically prohibit 'activities that would violate those rights'.[56] Although these declarations are of questionable legal validity, they have made an impact on environmental protection and citizen empowerment in a number of communities.[57] Most recently, the CELDF was retained to act on behalf of a watershed, which is intervening in a legal suit challenging the validity of a local bill of rights declaration.[58] The Fund reports that this is the first time that 'an ecosystem in the United States [has] filed a motion to intervene in a lawsuit to defend its own rights to exist and flourish.'[59]

---

[52] *Constitution of Ecuador*, Art. 1.
[53] Natalia Greene, *The First Successful Case of the Rights of Nature Implementation in Ecuador*, Global Alliance for the Rights of Nature <http://therightsofnature.org/first-ron-case-ecuador/>.
[54] Ibid.
[55] Community Environmental Legal Defense Fund, *Community Rights* <http://www.celdf.org/section.php?id=423>.
[56] Ibid.
[57] Mari Margil, 'Stories from the Environmental Frontier' in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011) 249, 249.
[58] Community Environmental Legal Defense Fund, *First-in-the-Nation Action - Ecosystem Files for Intervention in Lawsuit to Defend Own Legal Rights to Exist and Flourish* (2014) <http://www.celdf.org/press-release-first-in-nation-ecosystem-files-to-defend-legal-rights-to-exist--flourish>.
[59] Ibid.

The concept of a non-human natural entity possessing legal personality has also been trialled in New Zealand, where a major river has recently been granted legal personhood.[60] The river is recognised as possessing 'the rights, powers, duties and liabilities of a legal person', which are to be exercised through a 'human face and voice' appointed through partnership between the New Zealand Crown and the local māori 'iwi'.[61] The precise legal impacts of this novel reform will not be known until implementing legislation is passed. However, it is certain that this landmark agreement represents a significant development in the practical implementation of nature rights theory.

Despite these examples of support for the concept of 'nature rights', there are numerous criticisms aimed at the concept, both in theory and in practice. From a theoretical perspective at the most basic level, there is no universal agreement as to the precise basis for these rights claims. It is possible to argue that natural entities possess rights as the product of some form of broader 'right to life' possessed by the Earth as a natural entity. However, this is open to question, as it is arguable whether individual rights for individual natural entities would necessarily result from a broader right to life possessed by the Earth. Moreover, it is debatable whether these entities are even capable of acting as rights holders.[62] Elder argues that non-living natural entities are not 'morally relevant' as they lack sentience and are incapable of experiencing pain, and are therefore not capable of possessing 'rights'.[63] Whilst these are legitimate arguments against the recognition of such rights, it is important to note that there is an inherent 'speciesism' involved in any argument which seeks to reconcile the conferral of rights on human beings purely by virtue of their membership of the human species, whilst denying rights to other living and non-living entities on grounds that wouldn't preclude humans from rights claims.[64]

---

[60] Wanganui District Council, *Whanganui River Settlement* (2014) <http://www.wanganui.govt.nz/our-district/whanganui-river-settlement/Pages/default.aspx>. The agreement was ratified by the Whanganui Iwi in August 2014. Legislation has yet to be passed implementing the agreement. For further information on the Deed of Settlement, see: New Zealand Government, *Ruruku Whakatupua: Whanganui River Deed of Settlement Between the Crown and the Whanganui Iwi* (2014) <https://www.govt.nz/dmsdocument/2731.pdf>.

[61] Ibid [2.3].

[62] See generally the discussion in Joshua J Bruckerhoff, 'Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights' (2008) 86 (3) *Texas Law Review* 615, 635-636.

[63] P S Elder, 'Legal Rights for Nature - The Wrong Answer to the Right(s) Question' (1984) 22 (2) *Osgoode Hall Law Journal* 285, 290.

[64] Regarding the concept of 'speciesism', see generally Peter Singer, 'Speciesism and Moral Status' (2009) 40 (3/4) *Metaphilosophy* 567.

A further theoretical criticism takes issue with the presumption that natural entities have 'interests', and that human beings are capable of identifying and representing those interests. For example, Huffman argues that Stone's guardianship approach 'fails because we humans cannot know what serves the interests of natural objects, even assuming that they have interests in any meaningful sense.'[65] Such presumptions have been criticised as a form of hypocrisy by commentators who note that in attempting to give a voice to natural entities, and thereby avoiding anthropocentricism, nature rights advocates may be guilty of engaging in anthropocentric thinking, by presuming that 'they know what is best for the natural environment'.[66]

On a more pragmatic level, there are various issues facing practical implementation of the rights of nature. It is possible that the rights may be too broad to be capable of enforcement and recognition, or even if they are, their capacity to protect the interests of natural entities could be called into question in light of the continuing challenges facing the recognition and protection of more established human rights. Practical experience with existing nature rights recognition demonstrates the relevance of some of these issues. A prime case in point is the example of Ecuador's constitutional recognition of the rights of nature. Mary Whittemore argues that 'successful execution of the amendments is unlikely' for various reasons.[67] She argues that it is unlikely that the amendments will be effective in achieving their objectives of improved environmental protection, due to a range of factors, including: 'Ecuador's legal and political environment', 'lack of government accountability', 'legal barriers to implementation', 'past corruption in Ecuador's constitutional court' and 'procedural confusion over standing'.[68] In the eight years since the amendments were passed, the Ecuadorian government has achieved little in the way of ensuring the development of a conducive environment for their effective operation.[69] The reality remains that environmental degradation is still increasing in Ecuador despite the amendments, due largely to a fundamental inconsistency between the *Constitution*'s protection of the rights of nature and the government's pursuit of profit.[70]

[65] James L Huffman, 'Do Species and Nature Have Rights?' (1992) 13 *Public Land Law Review* 51, 59.
[66] Elder, above n 63, 289.
[67] Mary Elizabeth Whittemore, 'The Problem of Enforcing Nature's Rights Under Ecuador's Constitution: Why the 2008 Environmental Amendments Have No Bite' (2011) 20 (3) *Pacific Rim Law & Policy Journal* 659, 659.
[68] Ibid 661.
[69] It is acknowledged however that such institutional change requires significant resources and cultural change, and therefore perhaps it is too soon to pass judgement.
[70] Whittemore, above n 67, 663.

The experience of Ecuador demonstrates that stating that natural entities have rights which must be given serious consideration in decision-making affecting the environment will only have a chance of successfully contributing to environmental protection, if they are reinforced by a supportive institutional and political environment. Natalia Greene from the Fundación Pachamama (Ecuador) acknowledges that implementation of the provisions has been less than ideal, citing the challenges posed by Ecuador's political and economic climate.[71] However, she emphasises that the amendments have been a success in a broader sense. Recognition of the rights of nature represents a challenge to the dominant mindset which sees the law as a means of simply minimising or in some cases legitimising environmental harm.[72] She notes that the amendments have transformed public debate in Ecuador from focussing on how mining should be regulated, to a debate about whether mining should be taking place at all.[73] Similarly, Akchurin observes that 'social movement actors' have started to 'refer to the constitution as the new normative vision of where they want Ecuadorian society to be headed'.[74]

Despite these potential benefits, the practical workability of the 'rights of nature' are still largely unknown. There is no definitive exposition at the international level of the content of nature rights (although, there has been some debate over a proposal to introduce a charter of mother earth rights),[75] and there are serious questions regarding who has authority to speak on behalf of natural entities. Accordingly, although the concept of granting nature 'rights' is an interesting and important area for further research, it will not form the focus of this thesis in recognition of the unlikelihood of legal recognition in Australia. Given Australia's reluctance to recognise various human rights (such as ESC rights), it is highly unlikely that an Australian parliament would recognise rights of a more controversial nature.

[71] It should be noted that in 2013, the Ecuadorian Government dismantled Fundación Pachamama, in what is thought to have been a response to the non-profit's criticism of Government oil deals: Pachamama Alliance, *Fundación Pachamama* (2014) <http://www.pachamama.org/advocacy/fundacion-pachamama>.
[72] Natalia Greene, 'Rights of Nature and Ecuador's Constitutional Reform' Conference presentation delivered at the Wild Law Conference 2013 in Brisbane, Australia, 27 September 2013.
[73] Ibid.
[74] Maria Akchurin, 'Constructing the Rights of Nature: Constitutional Reform, Mobilization, and Environmental Protection in Ecuador' (2015) 40 (4) *Law & Social Inquiry* 937, 962.
[75] A global campaign has developed, seeking recognition of a *Universal Declaration of Rights of Mother Earth*. Bolivia has been a strong supporter of this campaign, as well as a range of international non-governmental organisations and networks working towards legal recognition of the rights of nature. For more information: Global Alliance for the Rights of Nature, *Universal Declaration of Rights of Mother Earth* <http://therightsofnature.org/universal-declaration/>.

3.5 Environmental Rights and Australia

Australia has thus far failed to embrace the environmental rights revolution. It is currently one of only fifteen nations (including Canada and the US) which does not recognise the human right to a healthy environment at the federal level.[76] Australia's premier piece of environmental protection legislation (*Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the 'EPBC Act')) does not contain any explicit environmental rights. Owing to the absence of a federal bill of rights, there is also no scope to recognise the right, or other environmental rights through the 'greening' of existing human rights. Similarly, at the state/territory level, there are no environmental rights included within bills of rights legislation in the ACT and Victoria. There have been no legislative attempts to introduce environmental rights at either level of government, and politically the issue has been relatively untouched. Despite this lack of legislative implementation, there have been some calls for recognition of environmental rights in Australia.

In particular, support has been expressed by various non-profit entities for the legal recognition of the human right to water and some form of the human right to a clean and healthy environment.[77] For instance, the Environment Defenders Office (NSW) and Environment Defenders Office (Victoria) Ltd have recommended 'specific protection of environmental rights either in the form of an encompassing right to a clean and healthy environment or a set of related environmental rights.'[78] It is important to consider why Australia has failed to follow these recommendations to recognise environmental rights, in order to identify potential challenges for attempts to recognise the rights in the future. The following section discusses a number of possible factors contributing to the decision to eschew a rights-based approach to environmental protection in Australia. Namely, the nature of the Australian legal and political system, the nature of Australian approaches to protection of human rights and the environment, and the perception that current approaches to environmental protection are adequate.

---

[76] Boyd, above n 1, 92.

[77] For example, Action for Aboriginal Rights, The Bendigo & District Environment Council Inc, the Public Interest Advocacy Centre and the Environment Defenders Office (Victoria) Ltd all advocated for the addition of environmental rights into Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic): Scrutiny of Acts and Regulations Committee (Vic), *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 51 <http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/report_response/20110914_sarc.charterreviewreport.pdf>.

[78] Environment Defenders Office (NSW) and Environment Defenders Office (Victoria) Ltd, *Protection of Human Rights and Environmental Rights in Australia* (2009) 12 <https://envirojustice.org.au/downloads/files/law_reform/edo_vicnsw_humanrights_environment.pdf>.

3.5.1 Factors explaining Australia's reluctance to join the environmental rights revolution

3.5.1.1 Australia's legal and political systems and approach to rights protection

Due to its foundations as a former English colony, Australia has a common law legal system characterised by observance of the rule of law and the concept of representative and responsible government. Interestingly, other similarly wealthy Commonwealth nations with common law legal systems, such as Canada and New Zealand, are also notable exceptions to the environmental rights trend.[79] Countries with civil law legal systems appear more willing to recognise environmental rights, which is perhaps unsurprising given their general preference for codification of law over gradual incremental development through case law and precedent.[80] In Australia, there is a longstanding preference for rights to be developed gradually over time through judicial precedent, rather than through broad rights declarations in legislation. Although Australia has not passed comprehensive legislation recognising the human rights contained within the major international human rights treaties (to which it is a party), it has various mechanisms in place for achieving human rights protection. This protection is achieved through a combination of constitutional interpretation, the common law, specific human rights legislation, the system of parliamentary democracy, and government policies intended to create a human rights culture. Due to this system of protection, it may be the case that there is a perception that the recognition of express environmental rights is unnecessary. Gellers' research exploring the factors leading to the adoption of environmental rights within nation states found that 'the worse a country's human rights record in terms of its protection of civil liberties, the more likely it is to promulgate an environmental right in its constitution'.[81]

There has been a traditional reluctance in Australia to engage in comprehensive recognition of human rights at the federal level. Despite significant public support for the introduction of a federal statutory bill of rights, and a 2009 recommendation from the National Human Rights Consultation Committee supporting the reform,[82] the federal government has failed

[79] Boyd, above n 1, 92.
[80] Ibid 60.
[81] Joshua C Gellers, 'Explaining the Emergence of Constitutional Environmental Rights: A Global Quantitative Analysis' 6 (1) *Journal of Human Rights and the Environment* 75, 94.
[82] National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009) <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter15#_ftnref9>.

to introduce a federal bill of rights. Although one state and one territory jurisdiction have enacted human rights charters,[83]Australia is yet to join the majority of the world's liberal democracies by declaring a list of the fundamental rights of its citizens in one uniform legislative instrument or constitution.

This reluctance to embrace broad rights declarations can be attributed to various factors, including (but not limited to):

- A belief that the most effective way to secure rights protection is through gradual development of common law precedent and where relevant, legislative recognition of specific rights negotiated through the political process;
- A concern that broad rights protection could lead to unintended and undesirable consequences;
- A perception that broad rights declarations are inconsistent with the nature of Australia's legal and political systems (for example, the notion of parliamentary sovereignty);[84]
- A concern that providing legislative or constitutional recognition of broad human rights would place the judiciary in an inappropriate position, both in terms of interpretation and enforcement;
- A concern that defining a list of comprehensive rights could actually serve to limit rights protection.[85]

Those jurisdictions which have embraced rights declarations, have restricted their recognition to CP rights. As explained by Taylor, the 'core concept' of CP rights is 'liberty of the individual, which is to be protected against the abuse and misuse of state authority'.[86] Arguably, these rights sit better with the underlying foundations of the Australian legal and political system, as both are built upon 'the political philosophy of liberal individualism and economic laissez-faire'.[87] As CP rights are liberty rights which grant citizens 'freedom from' certain treatment, but do not entail great demands upon the state,[88] they are better suited to this underlying political philosophy. In contrast, ESC rights operate as 'claims to social equality' (i.e. positive rights), and accordingly where necessary aim to compel 'state

[83] *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[84] George Williams, *A Bill of Rights for Australia* (University of New South Wales Press, 2000) 35-41.
[85] Ibid.
[86] Prudence E Taylor, 'From Environmental to Ecological Human Rights: A New Dynamic in International Law?' (1997-1998) 10 (2) *Georgetown International Environmental Law Review* 309, 318.
[87] Ibid 317.
[88] Ibid 318.

intervention' to achieve their fulfilment.[89] The nature of ESC rights does not sit as well with the Australian legal/political system, and for this reason they have been consistently denied legal recognition at both the federal and state/territory levels (despite support for their introduction from various individuals, organisations, institutions and the general public).[90] As environmental rights generally fall within the classification of 'second generation' or 'third generation' rights, and are by their very nature broad rights, it is perhaps unsurprising given the context outlined, that there has been a reluctance to afford them legal recognition. This conclusion is supported by Boyd's research, which found that '[o]f the twenty-three nations employing exclusively common-law systems, only three have environmental provisions in their constitutions'.[91] He argues that this 'reflects the Anglo-American caution regarding constitutional recognition of social and economic rights'.[92]

One of the main reasons for caution regarding the implementation of ESC rights in Australia relates to the role of the judiciary in their interpretation and enforcement. According to the concept of the separation of powers, the judiciary is only authorised to exercise judicial power, and must remain independent from the two political arms of government. Concerns over politicisation of the judiciary have been cited as reasons against the recognition of ESC rights at both the federal and state/territory levels.[93] ESC rights often concern controversial topics involving issues of distributive justice. As noted by Meyerson, if ESC rights are made justiciable, 'then courts are given the power to affect the distribution of resources'.[94] For instance, in regards to the management of the natural environment, some critics argue that the courts are an inappropriate institution for the resolution of complex environmental regulation issues. As noted by Boyd, '…critics argue [that] courts lack institutional capacity,

[89] Ibid 318.
[90] Proposals to include ESC rights in rights legislation have been rejected at the national, and state/territory levels. For example, in a 2011 review of the Victorian *Charter of Human Rights and Responsibilities Act 2006*, by the Victorian Scrutiny of Acts and Regulations Committee ('SARC'), the SARC did not support the Law Institute of Victoria's submission to include social and economic rights in the Charter: Law Institute of Victoria, 'Lawyers Disappointed at Charter Wind Back Proposals by Parliamentary Committee' (Media Release, 14 September 2011) <http://www.liv.asn.au>; Scrutiny of Acts and Regulations Committee (Vic), *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 52 <http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/report_response/20110914_sasa.charterreviewreport.pdf>.
[91] Boyd, above n 1, 51.
[92] Ibid.
[93] Helen Irving explains that concerns over inappropriate politicisation of the judiciary under a national Human Rights Act factored into the National Human Rights Consultation Committee's ultimate decision to recommend against the recognition of ESC rights in the proposed charter. However, she notes that these concerns are also applicable in the context of recognition of CP rights: Helen Irving, 'The Dilemmas in Dialogue: A Constitutional Analysis of the NHRC's Proposed Human Rights Act' (2010) 33 (1) *UNSW Law Journal* 60, 80.
[94] Denise Meyerson, *Jurisprudence* (Oxford University Press, 2011), 267.

technical expertise, and resources required to address complex environmental issues and are the wrong place for resolving polycentric issues involving conflicting values and diverse interests.'[95] In the US, the judiciary has been reluctant to adjudicate disputes of this nature due in part to its 'apprehension about playing the role of arbiter of … value-laden and technical questions', such as the meaning of 'clean and healthy environment'.[96] It is likely that the Australian judiciary would demonstrate similar caution over engaging in the determination of such questions, which are arguably more appropriately dealt with by the democratically elected legislature.

3.5.1.2 Australian approach to environmental protection

Australia's approach to environmental protection is not characterised by a willingness to make broad sweeping guarantees of environmental protection through policy or law. The *Australian Constitution* does not contain recognition of the importance of environmental protection, and in fact contains no specific federal head of legislative power to enable the federal parliament to legislate directly with respect to environmental matters. Accordingly, the federal legislature must utilise heads of legislative power which do not specifically pertain to the environment (such as the external affairs power and the corporations power) in order to pass federal environmental laws. As a result of this constitutional lacuna, considerable uncertainty, conflict and debate has focussed on the respective roles of the federal and state/territory governments over environmental protection and natural resources management. Particularly, with respect to the management of critical natural resources, such as water.

Similarly, in the US the 'federal government has no general plenary authority to enact laws', and has traditionally relied upon the commerce clause to achieve passage of environmental legislation.[97] Hill, Wolfson & Targ argue that the US legislature's failure to embrace environmental rights can in part be attributed to this lack of direct constitutional power, rather than 'any specific objection to creation of an environmental right.'[98] It may be the case that Australia's federal division of legislative power and environmental management responsibilities have similarly influenced attitudes regarding the necessity and desirability

[95] Boyd, above n 1, 28.
[96] Ibid 391.
[97] Barry E Hill, Steve Wolfson and Nicholas Targ, 'Human Rights and the Environment: A Synopsis and Some Predictions' (2003-2004) 16 *Georgetown International Environmental Law Review* 359, 390.
[98] Ibid.

of environmental rights recognition. There are also other aspects of Australia's approach to environmental protection which may have influenced the decision not to embrace environmental rights. As noted in Chapter Two, Australia has mostly adopted traditional command and control approaches to environmental protection, situated within a broader framework designed to achieve the goal of ecologically sustainable development. A rights-based approach would represent a potentially significant alteration to the status quo, as it represents a different conceptualisation of the human/environment relationship. As noted earlier, rather than conceptualising environmental protection as a service that the state chooses to provide, rights-based approaches conceive of environmental protection as a right owed to the citizenry by the state.

3.5.1.3 Perception of effectiveness of current approaches to environmental protection

It is possible that Australia has chosen not to adopt a rights-based approach to environmental protection due to a perceived lack of necessity. Unlike many other nations in the world, Australia can lay claim to a complex system of environmental laws, regulations and policies which are largely publicly accessible and enforceable (subject to certain qualifications and limitations). Examining the context within which other countries have embraced environmental rights perhaps sheds light on Australia's decision not to follow suit. In many of these jurisdictions, environmental rights have been viewed as a means of pursuing environmental justice and empowering citizens who feel that the current law provides them with inadequate recourse for public participation in environmental decision-making.[99] Some of the most ambitious environmental rights declarations have occurred in developing nations with far from impressive environmental protection track records.[100] In the context of governance systems struggling to achieve adequate protection of the environment due to broader governance issues, recognition of environmental rights may be perceived as more necessary.

As can be seen from the discussion in Chapter Two, there are reasonable grounds for presuming that there may not be a significant need for the development of new approaches to environmental protection in Australia, given the operation of various functional systems, laws and processes. However, it remains that Australia is yet to achieve the goal of ecologically sustainable development, an aim at the heart of Australian environmental

[99] For instance, Boyd's research found that this particular benefit of recognition of the human right to a healthy environment was particularly pronounced in various developing nations: Boyd, above n 1, 239.
[100] For example, Ecuador (as discussed above).

regulation. Accordingly, there does appear to be space to explore new approaches to ascertain whether they may assist in the achievement of this goal.

3.6 Conclusion

What is the environmental rights revolution, and why has it emerged? What are the types of environmental rights which have been recognised? Has Australia embraced the concept of environmental rights? If not, what are the possible factors explaining Australia's reluctance?

Australia is now part of a minority of countries which have failed to join the environmental rights revolution. The aim of this chapter was to explore the possible factors explaining the emergence of the environmental rights revolution around the world, in a bid to understand why Australia has exempted itself from this global trend. It was argued that the revolution has emerged as a result of various factors, including a perception that current methods for addressing the global decline in ecological health are inadequate, an increasing disenchantment with traditional environmental law, a desire to find a rationale for giving the interests of environmental protection increased prioritisation over potentially competing interests, and the popularity of the 'rights' discourse as a means of protecting fundamental interests. Understanding the factors leading to the emergence of the revolution at the international level sheds light on the possible reasons why Australia has failed to follow suit. In particular, the possible absence of a perceived need for alternative approaches to environmental protection, and the absence of a strong rights culture.

It was explained that the Australian political and legal system has not traditionally embraced broad rights declarations as a means of protecting the interests of humans or the environment. This is partially due to a longstanding belief that the most effective way to secure such protection is through gradual development of common law precedent, and where relevant, legislative recognition of specific rights negotiated through the political process. It is also partly due to concerns that broad rights declarations are inconsistent with the nature of Australia's legal and political system, and may lead to undesirable and unpredictable consequences. A further possible explanation for Australia's choice to eschew a rights-based approach is the perception that recognition of environmental rights could be duplicative, unnecessary or even potentially counter-productive in light of Australia's existing systems for environmental protection. Australian environmental law and policy is complex and operates at three governance levels (local/state/federal). Difficulties in predicting the potential impact of environmental rights recognition on these existing legal regimes may be one reason why this approach has not been actively championed. Moreover, there may be a

perception that environmental rights are unnecessary, as the current system may be viewed as operating relatively effectively.

Despite this traditional reluctance to recognise broad rights declarations as a means of protecting fundamental interests, and the potential perception that environmental rights recognition is unnecessary and undesirable for achieving environmental protection goals, there is scope to consider the potential benefits of the application of a rights-based approach in Australia. As demonstrated in Chapter Two, Australia is still facing numerous environmental challenges, and therefore must remain open to consideration of new tools for environmental protection. Accordingly, the next chapter considers the international legal status, scope and content of the human right to a healthy environment, in order to ascertain how recognition of the right may be utilised as a tool for environmental protection in Australia.

Chapter Four
International Legal Recognition of the Human Right to a Healthy Environment

Can the human right to a healthy environment be established as a moral right? What is the legal status of the right under international law? What is the scope and content of the right, and what obligations does it impose on states? How can compliance with the obligations imposed by the right be assessed at the international level?

4.1 Introduction

Over the past few decades, the possible existence of a human right to a healthy environment ('HRTHE') has attracted significant academic debate. This chapter aims to explore this debate, in order to determine whether the right is a fundamental human right necessary for the fulfilment of other human rights recognised under the principal human rights treaties. Commentators have argued for and against the existence of the right as a human right, with the weight of academic opinion arguably now weighing in its favour. However, the legal status, scope and content of the right under international law remains uncertain, largely due to the fact that the right has not been directly recognised under any binding global legal agreement.

The chapter first considers whether the right can be established as a moral human right. Concluding that it is possible to mount a persuasive argument for the right's existence as a moral human right, it then considers the legal status of the right at international law. It is argued that the right can most cogently be established as an implied right under the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR'), derived primarily from the rights to health and an adequate standard of living. As a derivative right, the precise content and expression of the right is uncertain as it has not been authoritatively articulated by a United Nations ('UN') body. Accordingly, as the UN has not yet recognised the right as an implied ICESCR right it is concluded that it is not yet possible to ascertain the precise content of the right. However, it is acknowledged that some guidance on the right's possible content can be ascertained from an examination of the content of the rights from which the HRTHE may be derived. Utilising this content, a number of potential obligations imposed by the right are outlined. Whilst these obligations have not been

articulated by an authoritative body, they suffice to demonstrate the possible obligations which may be associated with international legal recognition of the right as an ICESCR right. The chapter then turns to consideration of how compliance with the obligations imposed by the right may be assessed at the international level. It is concluded that due to the lack of guidance on the content of the right, it is not yet possible to define human rights indicators to measure progress towards domestic realisation of the right. However, it is argued that it is still possible to evaluate the possible benefits for domestic environmental protection associated with international legal recognition of the right. Accordingly, the subsequent chapter seeks to identify a number of benefits associated with the imposition of state obligations to protect, respect and fulfil the right.

4.2 Moral Right to a Healthy Environment

In order to establish whether the human right to a healthy environment is capable of constituting a moral human right, it is first necessary to consider the nature of rights more generally. There is a vast body of literature dedicated to the deceptively simple question, 'what are rights?' No one definition can be declared as objectively correct or authoritative. However, in their most basic sense, rights can be conceived as a means of asserting an entity's entitlement (or 'claim') to something. This may be an individual person's entitlement to be free from particular treatment by the state (such as the 'right to freedom from torture'), or it may conversely refer to the state's entitlement to exert a certain degree of power over individuals, in pursuance of the public interest (for example, a 'right to detain'). Authority for these claims may be based on morality, or the law. Rights claims based on the law can be conceived as legal rights. Legal rights are '…rights which exist under the rules of legal systems or by virtue of decisions of suitably authoritative bodies within them'.[1] As these rights are established under systems of law, they do not exist unless recognised either explicitly or implicitly within an established legal system.

Conversely, moral rights are a species of right which can be claimed by human beings simply by 'virtue of their humanity'.[2] These rights have been referred to by various terms (including 'natural rights'), and are the subject of a range of theories addressing their existence, rationale, value and operation. Human rights can be classified as both moral rights and legal rights. As they are universal and inalienable by nature, they are a classic example of natural or moral rights. They are possessed inherently by every human being, irrespective of legal recognition. However, recognition of these rights under international law, and within the domestic legal systems of states, can also render them legal rights.[3] For this reason, Hiskes explains that human rights occupy a 'rather ambiguous position between the fully moral status of the seventeenth century 'natural rights' formulations and the positivistic 'legal rights' whose origin is in positive law.'[4] He cites Habermas' attempt to resolve this

[1] Kenneth Campbell, *Legal Rights* (2013) Stanford Encyclopedia of Philosophy <http://plato.stanford.edu/entries/legal-rights/>.
[2] Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bill of Rights in Australia: History, Politics and Law* (UNSW Press Ltd, 2009) 2.
[3] The *Universal Declaration of Human Rights*, GA res. 217A (III), UN Doc A/810 at 71 (1948) states that the 'foundation of freedom, justice and peace in the world' is the 'recognition of the inherent dignity' and 'equal and inalienable rights of all members of the human family'.
[4] Richard P Hiskes, 'The Right to a Green Future: Human Rights, Environmentalism, and Intergenerational Justice' (2005) 27 *Human Rights Quarterly* 1346, 1349.

contradiction by suggesting that human rights can be viewed as 'extra-positive' rights.[5] By this he means that they are 'more than merely legal, although not quite fully universal moral rights.'[6]

Determining the nature of human rights has important implications for ascertaining criteria for assessing whether or not a particular claim is worthy of the status of a moral human right. As noted by Weston, there are numerous fundamental questions about human rights which are 'yet to receive conclusive answers', including:

> 'Whether human rights are to be viewed as divine, moral, or legal entitlements; whether they are to be validated by intuition, custom, social contract theory, principles of distributive justice, or as prerequisites for happiness; whether they are to be understood as irrevocable or partially irrevocable; whether they are to be broad or limited in number and content – these and kindred issues are matters of ongoing debate and likely to remain so as long as there exist contending approaches to public order and scarcities among resources.'[7]

These issues hint at the difficulty of agreeing upon criteria for ascertaining whether or not a particular claim is worthy of the status of a moral human 'right'. One key theory posits that moral human rights exist to protect fundamental human interests.[8] In order to qualify for the status of human rights, these interests must be 'of sufficient importance to justify having institutionalised duties on the part of others to respect and protect those interests'.[9] Therefore, according to this theory, in order to establish that humans have a moral right to healthy environment, it must first be determined whether they have an *interest of sufficient importance* to justify the imposition of duties upon others to protect, respect and fulfil that interest. Defining 'importance' for this purpose is problematic in itself. As noted by Jerome Shestack '…one may be speaking of one or more of the following qualities: (1) intrinsic value; (2) instrumental value; (3) value to a scheme of rights; (4) importance in not being outweighed by other considerations; or (5) importance as structural support for the system of the good life.'[10] Fortunately, human rights law provides some guidance in this regard. International human rights treaties have consistently sought to protect fundamental human interests, which impact on the quality and continuance of human life. Existing human rights

[5] Habermas quoted in ibid, 1350.
[6] Ibid.
[7] Weston quoted in Prudence E Taylor, 'From Environmental to Ecological Human Rights: A New Dynamic in International Law?' (1998) 10(2) *Georgetown International Environmental Law Review* 309, 316.
[8] For an explanation of interest based theories of rights, see Kenneth Campbell, *Rights*, Stanford Encyclopedia of Philosophy <http://plato.stanford.edu/entries/rights/#2.2>.
[9] Tom Campbell, *Rights: A Critical Introduction* (Routledge, 2006), xiii.
[10] Jerome J Shestack, 'The Philosophical Foundations of Human Rights' in Janusz Symonides (ed), *Human Rights: Concepts and Standards* (Ashgate, Gower & Lund Humphries Publishing, 2000) 33, 33.

recognise that humans have individual entitlements to claim to be treated in a certain way, or to be guaranteed access to certain resources, in order to ensure that they are able to lead a free and dignified life. As explained by Merrills, 'the concept of human rights is grounded in the idea of autonomy and self-realization',[11] and therefore as the claimed right to a healthy environment impacts on 'life, property and the ability to run one's affairs', he argues it is not 'incompatible' with the notion of a human right.[12] As all human rights are premised upon the presumption that humans have access to an environment capable of sustaining human life, the human right to a healthy environment can be viewed as a pre-requisite right to all other human rights. Indeed, various United Nations bodies have recognised that a healthy environment is a pre-requisite to the enjoyment of human rights.[13]

All human beings have an interest in maintaining a healthy natural environment, as humankind is reliant upon clean air, clean water and arable soil and land to sustain human life. Although some human beings may perceive that in the short term at least they have a more immediate interest in harming the natural environment (for example, in order to secure food, land, money, etc…), the pursuit of this interest would not even be possible if they did not have access to an environment capable of sustaining their physical existence. Accordingly it can be argued that all humans who have an interest in survival have an overriding and fundamental interest in maintaining the health of the natural environment.[14]

Maintaining a healthy natural environment therefore appears to satisfy the 'importance' threshold. It is however possible to argue that despite meeting this threshold, the interest could be 'adequately protected by norms weaker than rights'.[15] Utilising rights as the method of protection has implications for how the interest is balanced against other interests. As noted by Denise Meyerson, rights advocates argue that interests protected by rights 'are too

[11] J G Merrills, 'Environmental Protection and Human Rights: Conceptual Aspects' in Alan E Boyle and Michael R Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press, 1998) 25, 27.
[12] Ibid, 28.
[13] A summary of relevant statements is provided in Office of the United Nations High Commissioner for Human Rights and United Nations Environment Programme, *Human Rights and the Environment, Rio+20: Joint Report OHCHR and UNEP* (2012) 12-15 <http://www.unep.org/delc/Portals/119/JointReportOHCHRandUNEPonHumanRightsandtheEnvironment.pdf>.
[14] For the purposes of this discussion, it is presumed that the relevant environment is that of planet Earth. It is however recognised that it is theoretically possible that at some point in the future, humanity may be sustained in an environment other than Earth.
[15] James W Nickel, 'The Human Right to a Safe Environment: Philosophical Perspectives on Its Scope and Justification' (1993) 18 *Yale Journal of International Law* 281, 291.

important to be left to the mercy of a cost-benefit utilitarian exercise'.[16] In other words, to some extent they should be given the ability to operate as 'trumps'. As characterised by Dworkin, rights can be viewed as 'trumps' which are 'a card of a stronger suit than the general interest'.[17] Arguably, this level of protection is required in order to adequately protect the human interest in maintaining a healthy environment. Left unabated, human impacts on natural resources and the Earth's natural functioning would collectively result in further ecological decline, and most probably collapse. Despite the existence of an ever growing body of international and domestic environmental law and policy, the global environment is in a state of ecological crisis.[18] For this reason, human legal rights to impact on the health of the environment must in some instances be limited, modified or removed in order to protect, respect and fulfil the fundamental human interest in maintaining a healthy environment. Accordingly, protecting this interest with a 'right' may be a necessary means of ensuring that where required this fundamental interest is able to trump other less fundamental interests.

The foregoing discussion demonstrates that it is possible to mount a persuasive argument that the human right to a healthy environment exists as a moral right. However, it must be acknowledged that there are myriad theories regarding the nature of rights, the existence of moral rights, and the ways in which moral rights can be established. This is a highly contested area of political and legal philosophy, and accordingly it is not possible to state that the right can be definitively established as a moral right. In fact, Alston argues that '…the establishment of criteria of enduring relevance is almost impossible in a field that is constantly undergoing evolutionary flux'.[19] Specifically in relation to the articulation of environmental rights, he maintains that it is a 'quintessentially political issue'.[20] Despite this, for the purposes of this thesis it will be accepted that it is possible to establish a moral right to a healthy environment according to an interest based theory of rights. The following sections examine the extent to which the right is currently recognised internationally and in the law of nation states as a legal right.

[16] Denise Meyerson, *Jurisprudence* (Oxford University Press, 2010), 244.
[17] Meyerson summarising Dworkin, ibid.
[18] For an overview of some of the key environmental problems facing the global environment, see United Nations Environment Programme, *Global Environment Outlook 5 Assessment Full Report: Environment for the Future We Want* (2012) <http://www.unep.org/geo/geo5.asp>.
[19] Philip Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control' (1984) 78 (3) *The American Journal of International Law* 607, 616.
[20] Ibid.

4.3 Sources of the right at international law

The sources of international law are summarised in the *Statute of the International Court of Justice,* opened for signature 26 June 1945, 33 U.N.T.S. 993 (entered into force 24 October 1945) in Art 38 (1):

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Boyd has considered the application of each of these categories to the human right to a healthy environment, and concluded that the legal status of the right is dependent on the interpretation adopted. He notes that there is a divergence in opinion between those who adopt a 'progressive' interpretation and those who adopt a more 'traditional' approach. He explains that '[t]hose who favour a liberal, progressive interpretation of international law are more likely to affirm the establishment of the right to a healthy environment, while those who adhere to a more traditional, positivist approach will deny the existence of this right.'[21] Despite these differing interpretations he claims that according to his research, 'the majority of organizations and experts specializing in international law, human rights law, and environmental law agree that there is an emerging human right to a healthy environment'.[22] As the legal sources of the right are not the main focus of this thesis, this section will briefly consider each category, with a view to reaching a working conclusion as to whether the right exists at international law.

4.3.1 International custom

Dahlman explains that state practice must 'meet two conditions' in order to constitute customary international law – the '*objective element* and the *subjective element*':[23]

> The objective element requires that the practice is general. The subjective element, also known as *opinio juris sive necessitatis*, or simply *opinio juris*, requires that states follow the practice because they recognise it as a norm of international law.

[21] David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (UBC Press, 2012) 111.
[22] Ibid 106.
[23] Christian Dahlman, 'The Function of Opinio Juris in Customary International Law' (2012) *Nordic Journal of International Law* 327, 329. For judicial explanation of the requirement, see *North Sea Continental Shelf cases (Germany v Denmark, Germany v The Netherlands)* ICJ Rep (1969) 3 para 74.

Applying the first objective element to this context, it can be easily established that the state practice is 'general' and not specific to any particular region or country. A broad diversity of states from around the world have recognised some form of the HRTHE in their legal systems. As to the subjective element, there is significant evidence that this state practice is the result of recognition of the HRTHE as a norm of international law. Through an analysis of the customary law status of the right to a healthy environment, Lee concluded that 'there is evidence that the right is developing as a rule of customary international law'.[24] This conclusion was reached as a result of extensive consideration of state practices followed 'out of a sense of international legal obligation' to recognise the HRTHE.[25] Lee was careful to exclude from this analysis practices 'not undertaken with a sense of international legal obligation based on [a state's] recognition of a right to a healthy environment'.[26] This conclusion has also been reached by other academic commentators in the field,[27] and accordingly for the purposes of this thesis it will suffice to accept that the right may possibly exist under customary international law. However, as it is a contested source for the right, it will not be relied upon as potential grounds for recognition in the Australian domestic context.[28]

4.3.2 General principles of law

Another potential source of international law consists of the general principles of law recognised by civil nations. As explained by Mitchell and Beard, the 'principles referred to may be incorporated in the domestic law of either all, or most, nations'.[29] Boyd argues that 'an argument can be made that the right to live in a healthy environment constitutes a general principle of international law, based on a comparative assessment of domestic laws from

[24] Ibid 339.
[25] John Lee, 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law' (2000) 25 *Columbia Journal of Environmental Law* 283, 302.
[26] Ibid 315.
[27] For example, Collins argues that there is 'strong evidence of the emergence of the right to environment as a principle of customary international law': Lynda Collins, 'Are We There Yet? The Right to Environment in International and European Law' (2007) 3 (2) *McGill International Journal of Sustainable Development Law and Policy* 119, 136.
[28] Various commentators question the customary international law status of the right. For instance, Lewis argues that 'without evidence of widespread implementation and enforcement within domestic legal systems, it seems unlikely that a customary right could be established at the international level': Bridget Lewis, 'Environmental Rights or a Right to the Environment? Exploring the Nexus Between Human Rights and Environmental Protection' 8 (1) *Macquarie Journal of International and Comparative Environmental Law* 36, 43.
[29] Andrew Mitchell and Jennifer Beard, *International Law in Principle* (Thomson Reuters, 2009) 33.

around the world'.[30] Given the quantity of nations that have recognised the right in some form, it would appear that this argument is sustainable. However, recognition of a right of this nature via this source of international law would be unusual in the context of the types of principles which have been recognised by the International Court of Justice (ICJ) under this category. The ICJ has tended to recognise procedural principles rather than substantive rights of this nature.[31] Accordingly, whilst this may be a potential source for the right, it is a matter of debate as to whether the HRTHE could constitute a general principle of law.

4.3.3 Judicial decisions and the teachings of the most highly qualified publicists

Upon reviewing decisions from global and regional courts and commissions on the linkage between human rights and the environment, Boyd concluded that 'taken as a whole, these decisions indicate that the right to a healthy environment is gradually gaining broader recognition'.[32] He reviewed decisions by the International Court of Justice, the United Nations Human Rights Committee, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Court of Human Rights, the European Committee of Social Rights, and the African Commission on Human Rights.[33] Given the rigour of the analysis, it is unnecessary to duplicate the examination here. It is clear that there is a general trend towards greater acceptance of the HRTHE within these institutions. Similarly, Boyd notes a related trend whereby 'international law organizations, the majority of scholarly books and articles, and the majority of experts agree that there is an emerging human right to a healthy environment'.[34] Whilst there is still significant academic debate as to its precise nature, source, scope, content and expression, it is undeniable that the concept of a HRTHE is now an accepted part of the human rights discourse. However, as this category of international law constitutes a 'subsidiary source', it is 'not technically a means by which international law is created'.[35] Accordingly, this category could not be relied upon as the source of the right at international law, although evidence of judicial decisions and the teachings of publicists could be used 'for the determination of rules of law' in this context.[36]

[30] Boyd, above n 21, 92.
[31] Mitchell and Beard, above n 29.
[32] Boyd, above n 21, 94.
[33] Ibid.
[34] Ibid 104.
[35] Mitchell and Beard, above n 29, 35.
[36] Malcolm N Shaw, *International Law* (Cambridge University Press, 7th ed, 2014) 78.

4.3.4 International conventions

The most widely accepted source of international law can be found in the law established by international treaties and conventions. As discussed earlier, there is no binding international legal agreement expressly recognising and defining the human right to a healthy environment. However, as noted by John Knox, the United Nations Independent Expert on Human Rights and the Environment, 'the failure to include a right to a healthy environment in the seminal human rights instruments is due to timing, not substance.'[37] He explains that '[t]he modern environmental movement began in the late 1960s, just too late to be reflected in the foundational human rights treaties.'[38] Increasingly, the importance of the relationship between the protection of human rights and the protection of the natural environment has been recognised by international human rights bodies. The HRTHE is now expressly recognised in a number of regional human rights treaties and agreements,[39] and the significance of environmental health for the realisation of human rights has been recognised in various international human rights conventions.[40]

4.3.4.1 International Covenant on Economic, Social and Cultural Rights

Although the human right to a healthy environment is not expressly recognised under the ICESCR, there are a number of rights recognised under the Covenant which depend upon a healthy environment for their realisation. In particular, the rights to health and an adequate standard of living. Whilst the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) has recognised the importance of a healthy environment to the realisation of both of these rights, it has not recognised an implied right to a healthy

[37] John Knox, *Greening Human Rights* (2015) Open Democracy <https://www.opendemocracy.net/openglobalrights/john-knox/greening-human-rights>.
[38] Ibid. He goes on to note that subsequently in the 1970s,'[t]he international community recognized this connection in its very first major environmental conference, in Stockholm in 1972, which proclaimed that the natural environment is "essential" to the enjoyment of basic human rights, including the right to life itself.'
[39] Regional human rights treaties and agreements recognising a form of the human right to a healthy environment, include: *African* [*Banjul*] *Charter on Human and Peoples' Rights* opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986), *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador)* opened for signature 17 November 1988, OAS Treaty Series No. 69 (entered into force 29 November 1999), and the *Arab Charter on Human Rights* opened for signature 22 May 2004, reprinted in 12 IHRR 893 (2005) (entered into force 15 March 2008).
[40] Boyd (above n 21, 81) notes that three international human rights treaties 'indirectly suggest that a minimum level of environmental quality is a basic human right': the *Convention on the Rights of the Child* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), the *Convention on the Elimination of All Forms of Discrimination against Women* opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981), and the *Geneva Conventions*.

environment. However, it is possible that at some point in the future the Committee will recognise that the right to a healthy environment can be interpreted as an implied right under the Covenant, derived from the right to health,[41] and the right to an adequate standard of living (and possibly other rights).

The UNCESCR has already made statements which acknowledge the vital importance of a healthy environment to the realisation of both of these rights. In *General Comment No. 14* discussing the right to health, the Committee clarified that the right to health is not a 'right to be healthy'.[42] Rather it is a right to have the state respect certain freedoms and entitlements which facilitate the achievement of health.[43] It contains various comments of relevance to the right to a healthy environment. For example, the Committee noted that the right to health 'extends to the underlying determinants of health, such as… a healthy environment.'[44] In order to address these underlying determinants, Art 12.2 (b) of the Covenant obliges states to engage in the 'improvement of all aspects of environmental and industrial hygiene'.[45] The Committee explained that this comprises (amongst other things) '…preventive measures in respect of occupational accidents and diseases; the requirement to ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health.'[46]

In examining these obligations, the Committee took note of Principle 1 of the *Stockholm Declaration*[47] and various relevant international law developments of relevance to the right to a healthy environment.[48] In order to comply with these obligations, the Committee

[41] Melissa Fung notes that 'interpretations of the [Committee on Economic, Social and Cultural Rights] and UN Special Rapporteur have established it as being essential to the right to health': Melissa Fung, 'The Right to a Healthy Environment: Core Obligations Under the International Covenant of Economic, Social and Cultural Rights' (2006) 14 *Willamette Journal of International Law and Dispute Resolution* 97, 105.
[42] *General Comment No. 14: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UNCESCR, 22nd sess, E/C.12/2000/4 (2000), para 8.
[43] Ibid.
[44] Ibid para 4.
[45] Ibid para 15.
[46] Ibid.
[47] *Stockholm Declaration on the Human Environment*, UN Doc A/CONF.48/14/Rev.1 (1972).
[48] 'The Committee takes note, in this regard, of Principle 1 of the Stockholm Declaration of 1972 which states: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being", as well as of recent developments in international law, including General Assembly resolution 45/94 on the need to ensure a healthy environment for the well-being of individuals; Principle 1 of the Rio Declaration; and regional human rights instruments

explained that states are required to take both preventative and proactive measures. Measures include creating and implementing 'national policies aimed at reducing and eliminating pollution of air, water and soil'.[49] The Committee has also made reference to the importance of a healthy environment for securing all of the component rights of the right to an adequate standard of living. The right to an adequate standard of living encompasses various rights, including the right to food, the right to water and the right to housing. For instance, it is not possible to respect, protect and fulfil the right to food, without an adequate environment for food production (including soil, water and climactic conditions). Similarly, realisation of the right to water requires states to ensure the environmental health of water resources, in order to maintain the health and sustainability of the resource for both present and future generations.[50]

Accordingly, it can be seen that although the HRTHE is not expressly recognised under the ICESCR, it can be argued that there exists an implied HRTHE as a result of the express recognition of rights which require a healthy environment for their realisation. For the purposes of this thesis, the right is interpreted as an implied right under the ICESCR. However, it is recognised that this interpretation may not be adopted by the UNCESCR. Despite this, it is possible that the right may receive express recognition in the future. Accordingly, the following section considers the possible nature, scope and content of the human right to a healthy environment as an ICESCR right.

such as article 10 of the San Salvador Protocol to the American Convention on Human Rights.' *General Comment No. 14: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UNCESCR, 22nd sess, E/C.12/2000/4 (2000), 19 n 13.

[49] Ibid, para 36.

[50] *General Comment No. 15: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UNCESCR, 29th sess [5], E/C.12/2002/11 (2002).

4.4 Content and obligations imposed by the right

As the HRTHE has received neither express recognition under the ICESCR nor recognition by the UNCESCR as an implied right, it is not possible at present to identify the precise content of the HRTHE as a Covenant right. Although some aspects of the right's content can be identified through examination of the rights from which it may be implied, such analysis does not provide a comprehensive view of the right's content. Similarly, consideration of how the right's content has been interpreted within regional and national jurisdictions does not provide an accurate insight into the content of an implied or express HRTHE under the ICESCR. Until a UN body provides guidance, the content of the right under the ICESCR remains a matter of academic speculation. The human right to a healthy environment is capable of various possible interpretations. As Fung observes, the right can be given a narrow or broad interpretation:[51]

> A "right to a healthy environment" can mean, narrowly, the right to live in a healthy environment free from toxins or hazards that threaten human health, or, more broadly, a right to have that environment protected by legislative and other proactive measures. Corresponding duties of the State can be limited to merely refraining from unlawfully polluting air, water, and soil, or expanded to require the State "to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources…"[52]

It is possible that the UNCESCR may choose to conceptualise the HRTHE as a composite right, consisting of various component substantive and procedural rights necessary to secure the right to a healthy environment. Substantive rights may include rights to a biodiverse environment, clean air, a stable climate, clean water, healthy soil, and the right to live in a natural environment. There is also a range of procedural rights which may be incorporated within the right's content. These rights may include the rights to participate in decision-making affecting the environment, access to justice about environmental matters, and access to information about the environment.[53] Where the right has been recognised in the domestic

[51] Fung, above n 41, 126.
[52] Fung ibid citing *SERAC v. Nigeria*, Case No. ACHPR/COMM/A044/1, ¶ 51 (Afr. Comm'n Hum. & Peoples' Rts. May 27, 2002).
[53] Various procedural rights of relevance to environmental protection are already recognised at the international level. For a discussion of the extent and nature of protection in this regards, see: Donald K Anton and Dinah L Shelton, *Environmental Protection and Human Rights* (Cambridge University Press, 2011) 356-435. The most significant treaty addressing procedural rights relevant to environmental protection is the *Convention on Access to Information, Public Participation in Decision Making, and Access to Justice in Environmental Matters*, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001). Article 1 of the *Convention* explains that its objective is to 'contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being…' To do so, it requires that the parties 'shall guarantee the rights of access to information,

laws of states, it has been subject to varying interpretations regarding its content. If the UNCESCR decides to recognise the right under the Covenant and to elucidate its content, it may draw upon these national experiences with the operation and content of the right. However, the utility of this jurisprudence for clarifying the right's content under the ICESCR is limited by the different ways in which the right has been expressed and operationalised within each jurisdiction. Accordingly, the next section develops a methodology for determining the possible content of the right as an ICESCR right, without relying on guidance from national and regional interpretations of the right's content.

4.4.1 Potential content of the human right to a healthy environment under the ICESCR

In the context of the human right to a healthy environment, there has been no authoritative guidance provided by the UN as to the content of the right and the obligations it may impose on state parties. However, the UNCESCR has provided guidance regarding the content of the human right to water ('HRTW'), which is an implied right derived from the same rights from which the HRTHE may be implied (the rights to health and an adequate standard of living) under the Covenant.[54] Accordingly, consideration of the content of the HRTW provides some indication of the way in which the UNCESCR may approach interpretation of the HRTHE in the future. It also provides an insight into aspects of the content of the HRTHE which may overlap with the content of the HRTW.

The UNCESCR has outlined the content of the right to water in *General Comment No. 15*.[55] The Comment begins by explaining that the parties to the Covenant must 'adopt effective measures to realize, without discrimination, the right to water…'[56] It defines the right as entitling 'everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses'.[57] Accordingly, primarily the focus of the right is on ensuring that individuals have adequate physical and economic access to safe drinking water.

public participation in decision-making, and access to justice in environmental matters'. As of January2016, there are 39 signatories to the *Convention*.

[54] It has recently been clarified by the United Nations Special Rapporteur on the human right to water and sanitation and the Chair of the UN Committee on Economic, Social and Cultural Rights that the human right to water is distinct from (although related to) the human right to sanitation: United Nations Human Rights Office of the High Commissioner, 'Right to sanitation, a distinct human right – Over 2.5 billion people lack access to sanitation' (2015) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16903&LangID=E>.

[55] *General Comment No. 15: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UNCESCR, 29th sess [5], E/C.12/2002/11 (2002).

[56] Ibid, para 1.

[57] Ibid, para 2.

The Comment then considers the legal bases of the right, outlining the Covenant rights from which the right to water may be derived.[58] It explains that under Art. 11 (1), various rights are articulated as flowing from the realisation of the right to an adequate standard of living.[59] The Comment notes that the section uses the word 'including', which the Committee argues 'indicates that this catalogue of rights was not intended to be exhaustive'.[60] They argue that in addition to the rights to adequate food, clothing and housing, the right to an adequate standard of living also incorporates a right to water.[61] It is foreseeable that the Committee may adopt a similar interpretation in regards to the HRTHE, as it can be persuasively argued that a healthy environment is necessary for the realisation of an adequate standard of living.

The Committee further notes the relationship between the right to health and the right to water. It explains that under Art. 12 (2) (b) of the Covenant, parties are required to 'take steps on a non-discriminatory basis to prevent threats to health from unsafe and toxic water conditions'.[62] The Comment explains that this means that the parties 'should ensure that natural water resources are protected from contamination by harmful substances and pathogenic microbes'.[63] These statements from the Committee articulate an area of intersection between the human right to water and the HRTHE. In order to provide access to safe drinking water, states must ensure adequate environmental hygiene of the resource. Whilst in the context of the human right to water this may be interpreted narrowly to mean that the water utilised by citizens directly is free from toxins and pathogens, in the context of the human right to a healthy environment it may have a broader operation. Thus it could extend to the protection of water resources not intended for human use, and therefore impose a more general obligation to engage in environmental protection of water resources.

The Comment explains that the right to water 'contains both freedoms and entitlements':[64]

> The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies. By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.

[58] Ibid, para 3.
[59] Ibid.
[60] Ibid.
[61] Ibid.
[62] Ibid, para 8.
[63] Ibid.
[64] Ibid, para 10.

In order to realise these freedoms and entitlements, the Comment explains that the 'elements of the right to water must be *adequate* for human dignity, life and health' in line with the Covenant rights.[65] Accordingly, it outlines the obligations associated with ensuring the availability, quality, and accessibility of water. As the elements of the HRTHE would also have to be adequate for human dignity, life and health, it is likely that states would similarly need to ensure a healthy environment of adequate availability, quality and accessibility. Availability in the HRTHE context could impose an obligation that adequate environmental resources are maintained by the state. Quality in the HRTHE context could impose an obligation that a minimum standard of environmental quality is maintained. Accessibility in the HRTHE context could impose an obligation that a healthy environment is 'accessible to everyone without discrimination'.[66] Accessibility in the HRTW context incorporates physical and economic accessibility, as well as non-discrimination and information accessibility.[67] These aspects of accessibility could arguably also apply to the HRTHE. Accordingly, states may be obliged to ensure that access to a healthy natural environment is possible for all people within their jurisdiction, and that everyone is able to 'seek, receive and impart information' concerning environmental health and protection.[68]

Having outlined the normative content of the right, the Committee then outlined the content of the obligations to respect, protect and fulfil the HRTW. As explained by the Office of the High Commissioner for Human Rights, the obligation to respect 'means that States must refrain from interfering with or curtailing the enjoyment of human rights'.[69] The obligation to protect 'requires States to protect individuals and groups against human rights abuses', and the obligation to fulfil 'means that States must take positive action to facilitate the enjoyment of basic human rights'.[70] In regards to the obligation to respect the right, the Committee explained that the obligation 'requires that States parties refrain from interfering directly or indirectly with the enjoyment of the right to water'.[71] They specified that this includes (but is not limited to), refraining from 'unlawfully diminishing or polluting water'.[72]

[65] Ibid, para 11.
[66] Ibid, para 12 (c).
[67] Ibid, para 12.
[68] Ibid, para 12 (c) (iv).
[69] United Nations Office of the High Commissioner for Human Rights, *Frequently Asked Questions*, United Nations <http://www.ohchr.org/EN/AboutUs/Pages/FrequentlyAskedQuestions.aspx>.
[70] Ibid.
[71] *General Comment No. 15: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, above n 55, para 21.
[72] Ibid.

This represents a point of overlap with the HRTHE, as undoubtedly one of the aspects of the obligation to respect the HRTHE would be to require states to refrain from unlawfully diminishing or polluting the natural environment (which would include water resources).

In regards to the obligation to protect, the Committee explained that the obligation 'requires State parties to prevent third parties from interfering in any way with the enjoyment of the right to water'.[73] They explained that this includes 'adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems'.[74] Similarly, the obligation to protect with respect to the HRTHE would most probably oblige states to prevent third parties from denying access to a healthy environment, and polluting or diminishing the natural environment.

In regards to the obligations to fulfil, the Committee explained that the obligation 'can be disaggregated into the obligations to facilitate, promote and provide':[75]

> The obligation to facilitate requires the State to take positive measures to assist individuals and communities to enjoy the right. The obligation to promote obliges the State party to take steps to ensure that there is appropriate education concerning the hygienic use of water, protection of water sources and methods to minimize water wastage. States parties are also obliged to fulfil (provide) the right when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal.

They further explained that the obligation to fulfil 'requires States parties to adopt the necessary measures directed towards the full realization of the right to water', which includes 'according sufficient recognition of this right within the national political and legal systems', and 'adopting a national water strategy and plan of action to realize [the] right'.[76] It is likely that the obligation to fulfil in the HRTHE context would therefore require states to adopt the necessary measures to progress towards full realisation of the right, including recognising the right in their domestic legal systems, and adopting a national plan of action to realise the right. The Committee also explained that the obligation to fulfil requires states to 'adopt

[73] Ibid, para 23.
[74] Ibid.
[75] Ibid, para 25.
[76] Ibid, para 26.

comprehensive and integrated strategies and programmes to ensure that there is sufficient and safe water for present and future generations'.[77]

Recognition of the intergenerational aspects of the right to water indicates that it is likely that if the HRTHE was recognised as an implied Covenant right, it would enjoy a similar intergenerational operation. Collins advocates for the inclusion of an intergenerational component in any independently recognised HRTHE, in light of 'the profound vulnerability of future generations to harm resulting from our current environmental decision-making'.[78] She argues that this component is necessary as different types of environmental harm impact on the interests of current and future generations differently.[79] She reasons that '…a strictly present-focused right to environment would fail to achieve environmental protection sufficient to safeguard the interest of future humans, since some activities that cause little or no immediate environmental harm may be devastating to the future (e.g. groundwater mining).'[80]

Accordingly, if the HRTHE applies not only to present generations, but also future generations, the obligation to fulfil would impose on states a requirement to manage the natural environment in a way that ensures that future generations will be able to live in a healthy environment. This could be interpreted as creating an obligation on states to sustainably manage the natural environment, with a view to maintaining sufficient environmental quality and environmental resources to sustain future generations.

[77] Ibid, para 28. It stated that this may include:

> (a) reducing depletion of water resources through unsustainable extraction, diversion and damming; (b) reducing and eliminating contamination of watersheds and water-related eco-systems by substances such as radiation, harmful chemicals and human excreta; (c) monitoring water reserves; (d) ensuring that proposed developments do not interfere with access to adequate water; (e) assessing the impacts of actions that may impinge upon water availability and natural-ecosystems watersheds, such as climate changes, desertification and increased soil salinity, deforestation and loss of biodiversity; (f) increasing the efficient use of water by end-users; (g) reducing water wastage in its distribution; (h) response mechanisms for emergency situations; (i) and establishing competent institutions and appropriate institutional arrangements to carry out the strategies and programmes.

[78] Collins, above n 27, 149.

[79] Ibid.

[80] Ibid.

4.4.2 Core obligations imposed by the right

Having identified a number of aspects of the obligations to respect, protect and fulfil the right, the Committee then identified nine 'core obligations' requiring immediate realisation.[81] As an ICESCR right, states are obliged to progressively realise full realisation of the right, subject to resource limitations. The Covenant obliges parties to 'take steps' towards full realisation of the recognised rights.[82] However, it also obliges states to achieve the minimum core obligations of the right, immediately. As explained in *General Comment No. 3*, '…the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.'[83] The minimum essential levels of each right oblige states to immediately realise the core content of the right. Given the varying resource capacities of different states, it is important to ensure that requiring immediate compliance with the core obligations of the right does not impose unattainable obligations on states. The obligation to take steps towards progressive realisation of the remainder of the obligations recognises that achieving immediate full realisation of the right may not be possible in certain states due to resource constraints. The core obligations of the HRTW identified by the Committee are:

> (a) To ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease;
>
> (b) To ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups;
>
> (c) To ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times; and that are at a reasonable distance from the household;
>
> (d) To ensure personal security is not threatened when having to physically access to water;
>
> (e) To ensure equitable distribution of all available water facilities and services;
>
> (f) To adopt and implement a national water strategy and plan of action addressing the whole population; the strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process; it should include methods, such as right to water indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all disadvantaged or marginalized groups;
>
> (g) To monitor the extent of the realization, or the non-realization, of the right to water;

---

[81] *General Comment No. 15: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, above n 55, para 37.

[82] The Covenant obliges states to take steps '…individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures: *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) [2 (1)].

[83] *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, UNCESCR, 5th sess, E/1991/23 (1991).

(h) To adopt relatively low-cost targeted water programmes to protect vulnerable and marginalized groups;

(i) To take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation.[84]

There has been limited academic discussion regarding the possible core obligations imposed by the HRTHE. However, one commentator (Fung) has outlined a number of possible core obligations of the right by examining the 'application of the main treaties concerned with the right to a healthy environment at the global, regional, and state level'.[85] Through this analysis, Fung concludes that the obligations 'should concentrate specifically on those environmental issues affecting human health'.[86] She advocates for an approach to the identification of the core obligations of the right which is in accordance with the Covenant's focus on achieving progressive rather than immediate realisation of the right, within the state's *available resources.*[87] Acknowledging this, she argues that the core obligations should not require additional financial expenditure on behalf of states, given the imbalance in available resources between states.

She reasons that as core obligations 'place an immediate burden on a state, that burden should not be so great as to render it insurmountable'.[88] In her opinion, the obligations associated with the 'obligation to fulfil' would impose immediate costs on state parties upon ratification.[89] Accordingly, she argues that only the obligations to protect and respect should constitute core obligations.[90] In defining the scope of the right, Fung articulates possible examples of the core obligations to respect and protect the HRTHE 'that mirror the core obligations required under the rights to food, water, and housing' from which she argues that the right is derived under the ICESCR.[91] The following section considers all three types of obligation (to respect, protect and fulfil), and extends Fung's analysis in order to put forward a suggested set of core obligations imposed by the HRTHE.

[84] *General Comment No. 15: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, above n 55, para 37.
[85] Fung, above n 41, 102.
[86] Ibid.
[87] Ibid 118.
[88] Ibid.
[89] Ibid.
[90] Ibid 120.
[91] Ibid 126.

4.4.2.1 Obligation to Respect

The obligation to respect requires states to 'refrain from interfering with or curtailing the enjoyment of human rights'.[92] In the context of the HRTHE, Fung suggests that the core obligations may include:

- States abstaining from '…interfering with the ability of individuals to live in a healthy environment';[93]
- States refraining from '…unlawfully polluting air, water, and soil, for example, through industrial waste from state-owned facilities, from using or testing nuclear, biological, or chemical weapons, if such testing results in the release of substances harmful to human health';[94]
- States refraining from 'reducing the levels of clean air, water, and land to levels below those necessary for a healthful existence…';[95]
- States refraining from 'devastating existing areas meeting the quality requirements of a healthy environment';[96]
- State refraining from 'interfering with efforts by individuals or communities to relocate to "healthy environments"'.[97]

Reflecting on Fung's suggested obligations, it can be seen that the HRTHE may create a minimum standard of environmental health, which the state must refrain from reducing. By doing so, it characterises environmental pollution as a human rights breach, and the maintenance of a minimum standard of environmental quality as a human rights obligation. Such an obligation could have significant implications for how states engage in environmental management. It suggests that there is an ascertainable minimum level of environmental health necessary for human survival at present and into the future. Requiring states to refrain from reducing environmental health below this minimum standard could operate to prevent states from engaging in 'rollbacks' on environmental protection.[98] As the obligation has an intergenerational application, it is arguably not just limited to the

[92] Office of the High Commissioner for Human Rights, above n 69.
[93] Fung, above n 41, 126.
[94] Ibid.
[95] Ibid 129.
[96] Ibid 130.
[97] Ibid.
[98] Boyd, above n 21, 27-32.

maintenance of a minimum level of environmental health for human populations at present. Future generations equally have a right to a healthy environment, and accordingly the minimum standard of environmental health must be sufficient for humans both at present and into the future.

4.4.2.2 Obligation to Protect

The obligation to protect requires 'states to protect individuals and groups against human rights abuses'.[99] In the context of the HRTHE, Fung suggests that this may include:

- States ensuring 'that corporations or other third party actors are not violating peoples' environmental rights';[100]
- States taking 'active steps to improve environmental health';[101]
- States monitoring and addressing violations by third parties;[102]
- States enacting 'legislation to guarantee that private actors do not engage in practices that would reduce the quality of air, water, and land resources';[103]
- States monitoring 'the observance of adopted legislation to guarantee that individuals are actually free to exercise their rights';[104]
- States prohibiting 'discriminatory State practices protecting certain more affluent areas while tolerating or even facilitating the despoliation of other areas';[105]
- States enacting 'legislation to guarantee that private actors do not engage in practices that would reduce the accessibility of areas of adequate environmental quality'.[106]

Fung's analysis suggests that a fundamental aspect of the core obligation to protect the HRTHE is the duty to ensure that third parties (such as corporations) are not engaging in violations of the right. As the obligation to respect may require that a certain minimum level of environmental health must be maintained, the obligation to protect may therefore operate to require states to ensure that third parties are not engaging in actions which reduce

[99] Office of the High Commissioner for Human Rights, above n 69.
[100] Fung, above n 41, 127.
[101] Ibid.
[102] Ibid.
[103] Ibid 129.
[104] Ibid.
[105] Ibid.
[106] Ibid 130.

environmental health below that standard. She also argues that the right obliges states to take 'active steps' to improve environmental health.[107]

However, she limits this obligation on costs grounds, arguing that the 'core obligations of the right to a healthy environment should not necessitate development of a national plan to ensure the availability of a healthy environment since those duties would not be cost-free'.[108] Arguably however, development of a national plan could constitute part of the core obligations imposed by the right, as the plan could allow for resource constraints. Moreover, there is precedent for the requirement of a national plan as a core obligation of an ESC right, as the creation of a national water strategy was one of the core obligations of the HRTW identified by the UNCESCR in *General Comment No. 15*.[109]

4.4.2.3 Obligation to Fulfil

The obligation to fulfil requires that 'states must take positive action to facilitate the enjoyment of basic human rights'.[110] In the context of the HRTHE, Fung suggests that core obligations may include:

- States engaging in their 'own research and assessment of health and environmental conditions';[111]
- States taking 'reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources…';[112]
- States adopting 'measures against environmental and occupational health hazards'.[113]

As discussed above, Fung argues that these obligations 'would attribute the heaviest burden to the State' and therefore should not constitute core obligations.[114] However, it is difficult to see how the right could be realised in any effective manner without some aspects of these

[107] Ibid 127.
[108] Ibid 130.
[109] *General Comment No. 15: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, above n 55, para 37 (f).
[110] Office of the High Commissioner for Human Rights, above n 69.
[111] Fung, above n 41, 128.
[112] Ibid.
[113] Ibid.
[114] Ibid.

obligations constituting minimum core content. For instance, in order to refrain from reducing the minimum standard of environmental health, states would need to engage in research and assessment of health and environmental conditions. Accordingly, it is submitted that aspects of the obligation to fulfil should constitute part of the core obligations of the right.

4.4.2.4 Possible core obligations imposed by the right

In light of the foregoing discussion, it is possible to identify a number of potential core obligations of the HRTHE. Firstly, there may be a core obligation to create a national strategy and plan of action to implement the right. As noted above, there is precedent for requiring the creation of a national strategy and plan of action as a core obligation of an ESC right. Secondly, it is possible that there may be a core obligation to ensure adequate standards of environmental quality to enable an adequate standard of living and human health. This represents a minimum level of environmental health required to sustain human life. Arguably, due to the intergenerational nature of the right, non-core obligations would require states to take steps towards the achievement of a higher level of environmental quality and sustainability. However, in recognition of varying resource capacities of states, the core obligation would most likely only require immediate realisation of a minimum level of environmental health. Thirdly, there may be a core obligation to refrain from unlawfully polluting the environment. Refraining from unlawfully polluting the environment is not an overly arduous obligation to impose on states, and would significantly assist in helping to realise the right. Fourthly, there may be a core obligation to require states to refrain from interfering with an individual's enjoyment of a healthy environment.

As the HRTHE is an individual right, it is important that it is not only society as a whole that has the opportunity to enjoy a healthy environment, but that all people have the ability to live in and access a healthy environment. Further to this, there may also be a core obligation to ensure that access to a healthy environment is available to every person without discrimination. As all humans are entitled to human rights equally, it is important that the right to a healthy environment is not inequitably realised. This was similarly a focus of the HRTW core obligations. Another potential yet more contentious contender for a core obligation is the obligation to ensure adequate access to information about environmental health and management. It is possible that this might not constitute a core obligation as it

would arguably be possible to realise the key aspects of the right's content without imposing this obligation. However, it would most likely constitute a more general obligation imposed by the right.

Whilst these potential obligations have not been articulated by an authoritative body, they can be utilised to guide the thesis' analysis of the right's possible operation. It is not possible to accurately predict how the UNCESCR may choose to interpret the content of the right, and the core obligations it imposes on state parties. However, through examination of the Committee's approach to the interpretation of the HRTW it has been possible to identify some likely aspects of the right's content.

4.5 Assessing compliance with the obligations imposed by the right

By recognising the HRTHE at the international level, Australia would be committing to protect, respect and fulfil the obligations imposed by the right. However, as demonstrated by Australia's human rights record to date, international recognition of human rights does not necessarily translate into adequate domestic implementation and fulfilment.[115] For instance, despite significant international pressure over Australia's treatment of asylum seekers, Australia continues to pursue an immigration and detention policy which has been deemed to violate various international human rights.[116] Accordingly, it cannot be presumed that international legal recognition of the HRTHE will ensure that the right will be adequately realised at the domestic level in Australia. For this reason, it is necessary to determine methods for ascertaining state progress towards fulfilment of state obligations under international human rights law.

Although theoretically human rights are universal in nature, inevitably each jurisdiction develops different methods of fulfilling their human rights obligations, according to their means and within the confines of their political and legal systems. However, it is possible to define general standards by which a country's conduct can be assessed. Increasingly, the United Nations is utilising human rights indicators as a means of assessing state progress towards human rights realisation. Numerous attempts have been made to develop indicators for assessing human rights compliance, including for economic, social and cultural rights recognised under the *ICESCR*.[117] The Center for Economic and Social Rights has identified a number of 'organizations and individuals' who are 'working on developing new methodologies for monitoring human rights'.[118] In order to understand the importance of developing human rights indicators for economic, social and cultural ('ESC') rights such as the HRTHE, it is essential to define the meaning and purpose of indicators. It is equally

[115] For a summary of Australia's human rights record, see United Nations Human Rights Office of the High Commissioner, *Australia* <http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/AUIndex.aspx>.
[116] For example, in 2013 the UN Human Rights Committee 'found that the indefinite detention of 46 refugees with adverse security assessments was arbitrary and amounted to cruel, inhuman or degrading treatment under the International Covenant on Civil and Political Rights (ICCPR)': Australian Human Rights Commission, *Casenote: FKAG v Australia and MMM v Australia* (2013) <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/casenote-fkag-v-australia-and-mmm-v-australia>.
[117] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, art 2 (entered into force 3 January 1976).
[118] Center for Economic and Social Rights, *Key Links and Resources for Monitoring ESC Rights* (2012) <http://www.cesr.org/article.php?id=318>.

important to place the development of indicators into the broader context of the conceptual and practical challenges involved in monitoring human rights compliance.

4.5.1 Defining human rights indicators

The definition, utility and nature of international human rights indicators are all subjects of academic debate in the human rights literature. Whilst numerous definitions exist, a useful definition has been put forward by Gauthier de Beco, who defines human rights indicators as 'indicators that are linked to human rights treaty standards, and that measure the extent to which duty-bearers are fulfilling their obligations and rights-holders are enjoying their rights'.[119] Accordingly, human rights indicators are designed to assess state compliance 'under a legal standard',[120] as opposed to human development indicators which 'often focus only on human outcomes and inputs'.[121] The key difference lies in the fact that human rights indicators are equally concerned with monitoring procedural protection of human rights on the domestic level, such as 'the presence of relevant judicial institutions and legal frameworks'.[122] The utility of human rights indicators for monitoring State compliance is particularly significant in relation to ESC rights. Whilst some commentators argue that monitoring ESC rights using indicators is 'the future of human rights advocacy',[123] others argue that ESC rights 'should not be monitored at all'.[124] Although it is true that there are numerous challenges involved in monitoring ESC rights through the use of indicators, indicators do perform a number of useful functions which aid both human rights monitoring and compliance.

Judith Welling has outlined several of these benefits, including the fact that indicators can make state reporting 'more easily comparable to one another',[125] they can create 'interstate

[119] Gauthier de Beco, 'Human Rights Indicators for Assessing State Compliance with International Human Rights' 77 *Nordic Journal of International Law* 23, 23.
[120] AnnJanette Rosga and Margaret L Satterthwaite, 'The Trust in Indicators: Measuring Human Rights' (2009) 27 (2) *Berkeley Journal of International Law* 253, 300.
[121] Judith Welling, 'International Indicators and Economic, Social and Cultural Rights' (2008) 30 (4) *Human Rights Quarterly* 933, 949.
[122] Ibid.
[123] Sital Kalantry, Jocelyn E Getgen and Steven Arrigg Koh, 'Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR' (2010) 32 *Human Rights Quarterly* 253, 299.
[124] Andrew D McNitt, 'Some Thoughts on the Systematic Measurement of the Abuse of Human Rights' in David Louis Cingranelli (ed), *Human Rights: Theory and Measurement* (1988) 89, 89.
[125] Welling, above n 121, 941.

peer pressure to provide better information',[126] they can 'simplify the work of the CESCR treaty body',[127] and they can 'improve the quality and comprehensiveness of collected data'.[128] Perhaps most significantly, Welling identifies that by 'providing feedback on the outcomes of state policy, international indicators can inform decision making and suggest areas for future policy change at the government level.'[129] The educative effect of international indicators is particularly pronounced in the field of ESC rights, due to the complexities states face in attempting to comply with the duties recognised under the *ICESCR*. As noted by Rosga and Satterthwaite, the phrase 'States Parties recognize' in the *ICESCR* has been interpreted 'as creating an obligation on States Parties to construct programs, to design policies, or to set up regulatory systems that would allow individuals to enjoy the full realization of their rights'.[130] Any assistance which can be provided to States to help them determine how best to progressively realise ESC rights should be encouraged. The information and knowledge generated through the use of indicators is also useful for enabling non-government entities/public to monitor State compliance with human rights obligations.[131]

Determining the reasonableness of state efforts towards the progressive realisation of ESC rights is notoriously difficult. For this reason, it has been argued that indicators are an important mechanism for not only assisting States in recognising effective methods of realising ESC rights,[132] but also for determining the appropriate legal standard set by the requirement that States should use 'all appropriate means' to progressively achieve full realisation of ESC rights.[133] Welling argues that 'new information concerning the feasibility of particular state measures' is required to help inform this standard.[134] Analysing state compliance through the use of international indicators is one potential mechanism for producing and collating this information. For instance, indicators designed to measure realisation of the right to water might enquire into the adequacy of the legal framework

[126] Ibid.
[127] Ibid.
[128] Ibid 943.
[129] Ibid 944.
[130] Rosga and Satterthwaite, above n 120, 264.
[131] Welling, above n 121, 946-947.
[132] Kalantry, Getgen and Koh, above n 123, 254.
[133] Welling, above n 121, 956.
[134] Ibid. Welling further notes that one of the objectives of state reporting identified by the CESCR in *General Comment No. 1* was 'to develop a better understanding of the common problems faced by States and a fuller appreciation of the type of measures which might be taken to promote effective realization of each of the rights contained in the Covenant. Such knowledge will assist states in enacting policies and programs that provide for ESCR': ibid 945.

established to address water pollution. Assessing the comparative efforts of each party to address water pollution would create new information about the effectiveness and suitability of different legal and policy approaches to the problem.

Where the utility of indicators is accepted, debate focuses on the most effective *form* of indicators. Accordingly, numerous indicator typologies and approaches have been developed. A commonly utilised typology divides indicators into structural, process and outcome indicators. Structural indicators 'show a state's intention to abide by international human rights law',[135] process indicators 'measure the efforts undertaken by states to implement international human rights',[136] and outcome indicators 'measure a state's human rights performance'.[137] This typology has been characterised as constituting an 'analytical categories approach' to the development of international indicators.[138] By incorporating all three categories, the approach measures a 'duty-bearer's commitment, efforts and results, respectively'.[139] The approach can be contrasted with the 'obligations approach', the 'tripartite typology approach' and the 'merged approach'.[140]

The merged approach involves the merging of the human rights obligations approach with the analytical categories approach described above.[141] The human rights obligations approach involves examining 'the key elements of the right' and then determining the 'various indicators that could be best used to measure the applicable aspect of the right'.[142] Welling argues that the resulting approach forms 'a categorical framework that measures ESCR fulfillment more comprehensively than a single approach'.[143]

[135] de Beco, above n 119, 42.
[136] Ibid 43.
[137] Ibid 44.
[138] Welling, above n 121, 950.
[139] Office of the United Nations High Commissioner for Human Rights, *Report on Indicators for Promoting and Monitoring the Implementation of Human Rights*, UN Doc HRI/MC/2008/3 (6 June 2008) 6 [8].
[140] Welling, above n 121, 950.
[141] Virginia Roaf, Ashfaq Khalfan and Malcolm Langford, 'Monitoring Implementation of the Right to Water: A Framework for Developing Indicators' (2005) *Global Issue Papers* 11 <http://www.worldwatercouncil.org/fileadmin/wwc/Programs/Right_to_Water/Pdf_doct/Monitoring_implementation_of_the_RTW_Indicators.pdf>.
[142] Ibid 10.
[143] Welling, above n 121, 953.

4.5.2 Benefits and limitations of rights indicators

Although there are numerous benefits associated with the use of international indicators to monitor human rights compliance, certain challenges and limitations have been identified.

4.5.2.1 Clarity of content

Foremost amongst these challenges is the 'lack of clarity concerning the substantive content of the various rights' incorporated within the *ICESCR*.[144] As noted earlier in relation to the human right to a healthy environment, the precise scope and content of the right has not yet been clarified. Given the fact that indicators are designed to 'measure the extent to which duty-bearers are fulfilling their obligations' (explained above) under human rights treaties, it logically follows that if there is a lack of clarity concerning the nature of the obligations themselves, it will most likely be difficult to develop and use indicators to measure compliance with those obligations. In fact, it could be argued that in many ways, the *ICESCR* defers the most difficult (and political) questions to later interpretation by State parties. Commentators note that 'the language of ESC rights is couched in terms which have often been interpreted as 'aspirational''.[145]

For instance, the concept of progressive realisation has attracted criticism on the grounds that it could be 'used to excuse States' inaction'.[146] It is notoriously difficult to ascertain exactly what constitutes sufficient state action towards progressive realisation of ESC rights. A challenging balance has to be maintained between taking into consideration comparative capabilities between states and ensuring that the obligations recognised under the *ICESCR* provide sufficient safeguards for the 'universality' of human rights.

4.5.2.2 Universality, cultural diversity and state autonomy

A further issue regarding the legitimacy of international indicators concerns the assumption of universality they promote, which can sometimes come into conflict with 'recognition of cultural diversity' [147] – a theme which flows throughout the human rights literature.

[144] Rosga and Satterthwaite, above n 120, 274.
[145] Ibid 263.
[146] Ibid 269.
[147] Heiner Bielefeldt, 'Philosophical and Historical Foundations of Human Rights' in Catarina Krause and Martin Sheinin (eds), *International Protection of Human Rights: A Textbook* (Åbo Akademi University Institute for Human Rights, 2009) 3, 3.

Demonstrating this potential conflict, de Beco observes that international indicators run the risk of measuring a 'state's level of development more than its compliance with international human rights'.[148] Whilst it is important to recognise the different capacities/resources of state parties, it is equally important to maintain the concept of universality of human rights. Arguably, international indicators achieve this balance by creating a standardised means of monitoring state compliance whilst retaining sufficient flexibility to make allowances for differing state capabilities.

Despite the obvious benefits of standardisation (such as enabling comparative analysis),[149] some commentators have warned against constructing indicators which remove the 'gap' between 'international law and domestic policy'.[150] Rosga and Satterthwaite argue that removing this gap would 'short-cut democratic processes by imposing specific policy choices on States'.[151] Further, they argue that '...if indicators are created at a level of specificity that would allow the treaty bodies to determine compliance as a technical matter, those indicators would be overly specific, collapsing the very space for democratic participation and accountability that is *required* by human rights law.'[152] In a similar vein, Welling cites some common criticisms of international indicators, including the 'threat' they 'pose to states' decision-making autonomy'.[153]

Although these warnings should not be dismissed easily, it is possible to develop international indicators which make adequate allowances for these considerations. Indicators can be developed which respect the democratic authority of states to develop their own policy approaches for rights fulfillment. For example, although the right to water obliges states to ensure access to a minimum amount of clean affordable water, it does not dictate any particular mode of service delivery. Similarly, the right obliges states to include the public in decision-making relating to the management and use of water resources. It does not however require states to make any specific policy choices about *how* to include citizens in these processes.

[148] de Beco, above n 119, 46.
[149] Welling notes the benefits of '[a]n agreed-upon standardized framework', which 'guards against the selection of indicators that are irrelevant, repetitive, or inconsistent with other Covenant provisions': Welling, above n 121, 948.
[150] Rosga and Satterthwaite, above n 120, 308.
[151] Ibid.
[152] Ibid 312.
[153] Welling, above n 121, 957.

4.5.2.3 Authority

Numerous organisations (both government and non-government) have attempted to develop human rights indicators. However, the question over who has *authority* to develop indicators has attracted significant debate. Whilst some commentators argue that responsibility and authority for developing indicators lies with state parties, others argue that international indicators should be developed by United Nations treaty bodies, and relevant human rights experts. It is well established that 'primary responsibility for implementing human rights rests with *national actors*'.[154] However, monitoring of state implementation involves numerous actors, including domestic human rights bodies, UN treaty bodies, experts and national and international non-government organisations (NGOs).[155] As noted by Rosga and Satterthwaite, although UN bodies have developed and used international indicators to monitor state compliance, these attempts have been conducted 'in a context where their authority is constantly challenged by national governments.'[156] To enhance their authority (or as Rosga and Satterthwaite argue, to 'transform a judgment-laden process into one that appeared technical, scientific, and therefore…more legitimate'),[157] UN treaty bodies have increasingly sought guidance from expert individuals/groups/organisations.

Illustrating this trend, in 2008 the Office of the United Nations High Commissioner for Human Rights released a report titled '*Report on Indicators for Promoting and Monitoring the Implementation of Human Rights'* which aimed to outline 'a conceptual and methodological framework for identifying indicators for monitoring compliance with international human rights instruments'.[158] Kalantry, Getgen and Koh argue that the Report 'falls short of providing a concrete tool to monitor and evaluate states parties' adherence to a particular treaty'.[159] Irrespective of the validity of their argument, arguably the Report's aims were less ambitious – seeking to outline a framework, rather than a 'concrete tool' for monitoring. Whilst the Report 'presents a list of illustrative indicators for 12 human

[154] Martin Scheinin, 'International Mechanisms and Procedures for Monitoring' in Catarina Krause and Martin Sheinin (ed), *International Protection of Human Rights: A Textbook* (Åbo Akademi University Institute for Human Rights, 2009) 601, 601.
[155] As noted in the *Maastricht Guidelines* (prepared by a group of international human rights law experts), '[d]ocumenting and monitoring violations of economic, social and cultural rights should be carried out by all relevant actors, including NGOs, national governments and international organizations': *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1998) 20 *Human Rights Quarterly* 691.
[156] Rosga and Satterthwaite, above n 120, 258.
[157] Ibid 288.
[158] Office of the United Nations High Commissioner for Human Rights, above n 139, 1.
[159] Kalantry, Getgen and Koh, above n 123, 274.

rights',[160] the human right to a healthy environment is not amongst them.[161] The Report's methodology involves the use of structural, process and outcome indicators coupled with identified 'attributes' which were intended to 'capture…the essence of the normative content' of the rights examined.[162] The approach therefore proceeds upon the assumption that the normative content of the rights has been adequately (and authoritatively) outlined in 'relevant articles of the treaties and general comments of the committees'. [163] This presumption is questionable, given the continually contested content of most of the rights incorporated within the *ICESCR*, and problematic when faced with the prospect of emerging rights.

4.5.3 Human rights indicators for the human right to a healthy environment

At present, there are no internationally accepted human rights indicators for the human right to a healthy environment. Additionally, there have been no attempts to develop an indicator set by any qualified individuals or institutions. In order to do so, it would be necessary to adopt one of the approaches to the development of indicator sets, outlined above. It is submitted that the approach adopted by Kalantry, Getgen and Koh is preferable. This approach involves:

> 1) 'analyzing the specific language of the treaty that pertains to the right in question';
> 2) 'defining the concept and scope of the right';
> 3) 'identifying appropriate indicators that correlate with state obligations';
> 4) 'setting benchmarks to measure progressive realization'; and
> 5) 'clearly identifying violations of the right in question'.[164]

Accordingly, the following section follows the first two steps in the process, in a bid to ascertain whether it is possible to develop human rights progress indicators for the human right to a healthy environment. In accordance with Kalantry, Getgen and Koh's approach, in order to develop indicators for the right it is first necessary to analyse the specific language of the relevant treaties creating the obligations. This mirrors the approach adopted by the OHCHR. In its 2008 Report (discussed above), the OHCHR explained the methodology it used to identify the key 'attributes' of the rights considered. They stated that firstly it is necessary to convert 'the narrative on the legal standard of the right' into 'a limited number of characteristic attributes that facilitate a structured identification of appropriate indicators

[160] Office of the United Nations High Commissioner for Human Rights, above n 139, 19.
[161] However, elements of the right to water (which is associated with the HRTHE) are included within the illustrative indicators developed for the right to life: Office of the United Nations High Commissioner for Human Rights, Office of the United Nations High Commissioner for Human Rights, above n 139, 22.
[162] Ibid.
[163] Ibid.
[164] Kalantry, Getgen and Koh, above n 123, 254.

for monitoring the implementation of that right.'[165] They noted that due to the sometimes 'general' and 'overlapping' standards outlined in the Covenant and the General Comments, the process of identifying the attributes of the right can assist in the 'process of identifying indicators'.[166]

The OHCHR found that for the majority of human rights considered, 'on average about four attributes were able to capture reasonably the essence of the normative content of those rights'. [167] To identify these attributes, they examined relevant international treaties addressing the normative content of the rights.[168] In 2012, the OHCHR released further guidance on the measurement and implementation of human rights indicators. They explained that there are 'three considerations that guide the identification of the attributes of a human right':

> To the extent feasible, the attributes should be based on an exhaustive reading of the standard, starting with the provisions in the core international human rights treaties, so that no part of the standard is overlooked either in the choice of the attributes of a particular human right or in identifying the indicators for that right;
>
> To the extent feasible, the attributes of the human right should collectively reflect the essence of its normative content, be few in number and their articulation should help the subsequent identification of the relevant indicators; and
>
> To the extent feasible, the attributes' scope should not overlap. In other words, the selected attributes should be mutually exclusive.[169]

Given this focus on reflecting the normative content of the right, human rights experts have warned that 'only those rights that have been normatively justified (by norm entrepreneurs within the UN human rights system) and conceptualized (through the structure-process-outcome typology) would be amenable to indicator development'.[170] Accordingly, due to the absence of authoritative guidance on the normative content of the HRTHE, it is not yet possible to develop an indicator set for the right. If the right is accepted as an implied right under the ICESCR, guidance would need to be provided by the UNCESCR before an

[165] Office of the United Nations High Commissioner for Human Rights, above n 139, 5.
[166] Ibid.
[167] Ibid.
[168] Ibid 6.
[169] Office of the United Nations High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation* (2012) 31 <http://www.ohchr.org/Documents/Issues/HRIndicators/AGuideMeasurementImplementationCover_en.pdf> .
[170] Benjamin Mason Meier, Jocelyn Getgen Kestenbaum, Georgia LYN Kayser, Urooj Quezon Amjad and Jamie Bartram, 'Examining the Practice of Developing Human Rights Indicators to Facilitate Accountability for the Human Right to Water and Sanitation' (2014) *Journal of Human Rights Practice* 159, 171.

indicator set could be developed. To date, there has only been one attempt to develop an indicator set for an implied right under the ICESCR – the human right to water. In 2005, Virginia Roaf, Ashfaq Khalfan and Malcolm Langford outlined a framework for developing indicators for the right to water, which addressed the aspects of the HRTW outlined under *General Comment No.15*.[171] The potential indicators developed through this project were the product of an expert workshop involving 'representatives of the main UN agencies monitoring access to water, governments, the UN Committee on Economic, Social and Cultural Rights, NGOs and other experts on the right to water'.[172]

The authors adopted the 'merged approach' (discussed earlier) by organising the indicators 'according to the [analytical categories] approach, with the indicators categorised according to the human rights obligations approach'.[173] Accordingly, the indicators were divided into the analytical types discussed above – structural, process and outcome indicators.[174] According to Roaf, 'the gaps in the existing indicators in terms of relevance to a rights-based approach were the structural indicators'.[175] Structural indicators refer to 'questions about the policy environment for delivery of the human right, with reference to law, constitutions and policy institutions'.[176]

The resulting 'menu of choices' of potential indicators are summarised in a matrix attached to the report.[177] The matrix indicates whether the indicators are structural, process or outcome indicators and which duties they are designed to capture (i.e. the duties to respect, protect and fulfil). It is important to note that the indicators included in the report do not constitute an exhaustive list of the possible indicators relevant to monitoring the fulfilment of the right to water. However, they do provide a starting point for analysis, which can be expanded through further research and as evolving understandings of the scope and nature of the substantive content of the right develop.

[171] Roaf, Khalfan and Langford, above n 141, 3.
[172] Ibid.
[173] Ibid 11.
[174] Ibid 9.
[175] Virginia Roaf, 'Initial Development of Indicators for the Right to Water and Sanitation' in Sabine Hoffman, *The Implementation of the Right to Water and Sanitation in Central and Eastern Europe* (2006) 7 <http://www.awhhe.am/downloads/publications/Paper-english.pdf>.
[176] Roaf, Khalfan and Langford, above n 141, 9.
[177] Ibid, 47-57.

It is not possible to apply this approach to the HRTHE, as unlike the human right to water, the HRTHE has not been the subject of a UNCESCR General Comment. As noted by Kalantry, Getgen and Koh, it is crucial to 'understand the concepts and scope of the obligations' imposed by a right before developing indicators to measure state compliance.[178] Attempting to develop an indicator set for the HRTHE at this stage would raise issues relating to 'clarity of content' and 'authority' discussed earlier. Indicator sets to evaluate state compliance with the right should ideally be developed by individuals and/or organisations with greater authority, utilising guidance from international authorities on the content of the right. Whilst it may not be possible to assess Australia's current level of compliance with the right at this stage, it is possible to ascertain how international legal recognition of the right may potentially impact on Australia's systems for environmental protection and management. Accordingly, the following chapter seeks to identify a number of potential benefits for Australian environmental protection associated with international legal recognition of the right.

[178] Kalantry, Getgen and Koh, above n 123, 273.

4.9 Conclusion

Can the human right to a healthy environment be established as a moral right? What is the legal status of the right under international law? What is the scope and content of the right, and what obligations does it impose on states? How can compliance with the obligations imposed by the right be assessed at the international level?

The purpose of this chapter was to consider the legal status of the human right to a healthy environment under international law, with a view to ascertaining the potential obligations it may impose upon Australia. It was concluded that a persuasive argument can be mounted for the existence of a moral right to a healthy environment, and that although the legal status of the right at international law is still a matter of debate, the right can be viewed as an implied right under the ICESCR. Whilst it was concluded that the content of the right cannot be definitively known until the UNCESCR provides authoritative guidance, the foregoing discussion does elucidate some possible aspects of the right's content. The UNCESCR's statements in regards to the content of a related ICESCR implied right (the human right to water) were examined, in order to provide insight into the possible contours of the HRTHE under the Covenant. Utilising this content, a number of potential obligations imposed by the right were outlined. Additionally, a set of potential core obligations requiring immediate realisation were identified. These include an obligation to create a national strategy and plan of action to implement the right, an obligation to ensure adequate standards of environmental quality to enable an adequate standard of living and human health, an obligation to refrain from unlawfully polluting the environment, and an obligation to refrain from interfering with an individual's enjoyment of a healthy environment. It was further suggested that there may also be a core obligation to ensure that access to a healthy environment is available to every person without discrimination, and that every person has adequate access to information about environmental health and management.

It was argued that the right does not oblige states to immediately facilitate access to a completely healthy environment, nor does it dictate a particular means of achieving the outcome sought. Rather, it imposes on state parties an obligation to take steps towards the full realisation of the right, whilst allowing for state autonomy in how to fulfil the obligations at the domestic level.

It was concluded that as a result of the lack of guidance on the normative content of the right under the ICESCR, it is not yet possible to develop human rights indicators to assess state progress towards realisation of these obligations. However, it was argued that even though Australia's current level of compliance with the right can not be assessed, it is possible to evaluate the possible impacts of international legal recognition of the right for Australian environmental management and protection. Accordingly, the next chapter aims to identify some potential benefits associated with the imposition of the obligations to protect, respect and fulfil the right.

Chapter Five

Potential Benefits of Legal Recognition of the Human Right to a Healthy Environment for Australian Environmental Protection

What are some potential benefits for environmental protection in Australia associated with international legal recognition of the human right to a healthy environment? How could the human right to a healthy environment be recognised under Australia's domestic laws? What potential benefits for environmental protection may be associated with domestic legal recognition of the right? What are the possible limitations of both forms of recognition?

5.1 Introduction

The aim of this chapter is to determine the potential benefits for environmental protection in Australia associated with international and domestic legal recognition of the human right to a healthy environment. The chapter first considers the possible options for international legal recognition of the right, concluding that whilst explicit recognition of the right within a global binding treaty would be ideal, at present it is more likely that the right would receive recognition under an existing human rights treaty as an implied right. Accordingly, the possible benefits for domestic environmental protection associated with international legal recognition of the right as an ESC right under the ICESCR are considered. It is argued that it is possible to identify three key potential benefits associated with this form of international legal recognition. Namely, increased scrutiny of Australia's environmental protection performance, the ability to benefit from international experience with the implementation of the right, and comparison against an international standard. Whilst none of these potential consequences are guaranteed to result in benefits for environmental protection, they certainly have the potential to do so. This potential is demonstrated through a case study of the realisation of these potential benefits in the case study context of water resources management.

The chapter then turns to consideration of the possible options for domestic legal recognition of the right in Australia. Whilst it is acknowledged that there are numerous possible options, it is explained that the thesis will be limited to exploration of eleven recognition options. It is argued that whilst various strong theoretical criticisms have been made against the adoption of rights-based approaches to environmental protection, the practical experience of

numerous jurisdictions with legal recognition of the HRTHE demonstrates that benefits can flow from domestic recognition. Seven of the benefits associated with domestic legal recognition in other jurisdictions are outlined, and their potential benefits for environmental protection in the Australian context according to the definition of benefits adopted in Chapter One are considered. Having identified that these potential benefits could constitute benefits in the Australian context, and may possibly be realised through domestic legal recognition of the right, it is concluded that the identified options for domestic legal recognition of the right warrant exploration. Accordingly, Chapters Six and Seven are devoted to consideration of the potential realisation of the identified benefits under different constitutional and legislative forms of domestic legal recognition.

5.2 Options for international legal recognition of the human right to a healthy environment

As explained in the previous chapter, it is possible to interpret the HRTHE as an implied right under the ICESCR. However, it is also possible that future international legal recognition of the HRTHE could take other forms. For instance, the right could be recognised in an international treaty as an express individual right on its own, or within the context of other environmental rights. An attempt was made over two decades ago to draft an international document outlining the human rights obligations of relevance to securing the right to a healthy environment. The *Draft Principles on Human Rights and the Environment* (‘*Draft Principles*’) were prepared by an international group of human rights experts in 1994, at the invitation of the Special Rapporteur on Human Rights and the Environment (Madame Fatma Zohra Ksentini).[1] Principle 2 states that ‘[a]ll persons have the right to a secure, healthy and ecologically sound environment.’

The *Draft Principles* outline various substantive and procedural aspects of the right, including recognition of the intergenerational nature of human rights obligations in this context. However, as noted by Handl, the prospects for formal international legal adoption of the *Draft Principles* ‘remains cloudy’.[2] Shelton suggests that this may partly be attributed to the drafting process which did not include representatives from various relevant expert bodies (such as the United Nations Environment Programme), consequently leading to a ‘perception that the text was unbalanced, overly-ambitious, and not reflective of the state of the law’.[3] Accordingly, although it appears unlikely at present, it is possible that the HRTHE could be recognised under a specific international treaty outlining the human rights obligations relevant to securing fulfilment of the right. However, as this thesis advocates for an interpretation of the ICESCR that recognises an implied HRTHE under the Covenant, the following section is limited to consideration of the benefits associated with recognition of the HRTHE as an ICESCR right.

[1] *Draft Declaration of Principles on Human Rights and the Environment*, Fatma Zohra Ksentini, Special Rapporteur, UN Doc E/CN.4/Sub.2/1994/9 (1994) annex 1.
[2] Günther Handl quoted in Donald K Anton and Dinah L Shelton (eds), *Environmental Protection and Human Rights* (Cambridge University Press, 2011) 139.
[3] Dinah Shelton, *Human Rights and Environment: Past, Present and Future Linkages and the Value of a Declaration* (2009) Background Paper (Draft), High Level Expert Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward, Nairobi, 30 November – 1 December 2009, 30.

5.3 Potential benefits for Australian environmental protection associated with international legal recognition

It is possible to identify three key potential benefits associated with international legal recognition of the HRTHE as an ICESCR right. Namely, increased scrutiny of Australia's environmental protection performance, the ability to benefit from international experience with the implementation of the right, and comparison against an international standard. Whilst none of these potential consequences are guaranteed to result in benefits for environmental protection, they certainly have the potential to do so.

5.3.1 Potential benefits for environmental protection

5.3.1.1 Increased scrutiny

International legal recognition of the HRTHE as an ICESCR right would subject Australia's approach to environmental protection and management to international scrutiny. It would open up Australia's approaches to environmental issues to an international discussion, informed by universal human rights standards. Australia's environmental performance would be subject to the monitoring, reporting and complaints mechanisms under international human rights law. Australia is already subject to scrutiny by the Committee on Economic, Social and Cultural Rights, requiring compliance with state reporting requirements.[4] To some extent, aspects of Australia's environmental protection regime are already subject to scrutiny through reporting on progress towards the realisation of other ESC rights under the Covenant. For instance, in consideration of Australia's fourth periodic report under the Covenant in 2009, the Committee noted with concern the 'impact of climate change on the right to an adequate standard of living'.[5] However, by recognising the HRTHE as an ICESCR right, Australia would be required to report on its progress towards realisation of the right, and the Committee would be empowered to more comprehensively comment on the adequacy of Australia's approach to implementation. It is further possible that international legal recognition of the right could empower individual citizens to raise complaints about violations of the right with the UN.

[4] Australian Human Rights Commission, *Scrutiny under the International Covenant on Economic Social and Cultural Rights* <https://www.humanrights.gov.au/scrutiny-under-international-covenant-economic-social-and-cultural-rights>.
[5] Australian Human Rights Commission, *CESC Concluding Observations 2009* <https://www.humanrights.gov.au/cesc-concluding-observations-2009>.

As of 2013, there is in force an Optional Protocol to the ICESCR which enables individuals and groups of individuals to submit communications to the Committee 'claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party'.[6] Although Australia is yet to sign and ratify the Optional Protocol, it may do so in the future. If the HRTHE was recognised as a Covenant right, and the Optional Protocol was ratified by Australia, Australian citizens (having exhausted all domestic remedies) would be empowered to submit communications to the committee alleging violations of the HRTHE. To date, the Committee has only published its views on one communication received since the Protocol entered into force. The Committee found that the state party in question (Spain) had violated the right to housing of the individual who brought the communication.[7] The Committee issued a number of recommendations to the state party indicating how compliance with the right could be achieved, and requested that the state party formally respond to the Committee's views within a specified time period.[8]

The case was published online, receiving significant attention, and drawing international scrutiny on Spain's approach to the realisation of the right to housing under the Covenant. Experience with the more established first *Optional Protocol to the International Covenant on Civil and Political Rights* provides some indication as to the potential future impact of the Optional Protocol to the ICESCR on human rights protection.[9] As noted by Poynder, although the Committee's views 'are not enforceable', they are 'widely published and carry significant moral and persuasive authority'.[10] He cites the case of *Toonen v Australia* ('*Toonen*') as support for this argument.[11] In the case of *Toonen*, the UN Human Rights Committee found that certain Tasmanian criminal laws criminalising homosexual acts were in breach of Article 17 (right to privacy) of the *International Covenant on Civil and Political*

[6] *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, opened for signature 24 September 2009, UN GA Res A/RES/63/117 (entered into force 5 May 2013) art 2.
[7] United Nations Human Rights Office of the High Commissioner, *Spain Violated the Rights of a Woman Whose House Risks Being Auctioned – UN Committee* (2015) <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16457&LangID=E>.
[8] United Nations Economic and Social Council, *Views: Communication No. 2/2014*, 55th sess, UN Doc E/C.12/55/D/2/2014 (13 October 2015) ('*I.D.G v Spain*').
[9] *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976).
[10] Nick Poynder, 'When All Else Fails: The Practicalities of Seeking Protection of Human Rights under International Treaties' (2003) Public Lecture presented by the Castan Centre and Australian Lawyers for Human Rights at Baker & McKenzie, Melbourne on 28 April 2003 <https://www.monash.edu/law/centres/castancentre/public-events/events/2003/poynderpaper>.
[11] Human Rights Commitee, *Views: Communication No. 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) ('*Toonen v Australia*').

Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').[12] Poynder argues that 'there is no doubt' that the Committee's findings were the motivation behind the Commonwealth Parliament's subsequent enactment of legislation which prohibited Commonwealth/State/Territory laws from arbitrarily interfering with the privacy of consenting adults to engage in sexual conduct (within the meaning of Art 17 of the ICCPR).[13] This response by the Commonwealth demonstrates the significant impact that the Committee's views can have upon state practices, despite the fact that the Committees views are not binding. However, as a general trend, Eastman argues that 'the Australian Government's response to [the Committee's] recommendations 'has been poor'.[14] Moreover, she notes that the expense and delays involved in the process can prove problematic.[15] Inadequate responses by the Australian Government, and time and cost issues, may also limit the effectiveness of the Optional Protocol to the ICESCR. However, it is undeniable that some benefits could be derived from increasing international scrutiny on Australia's realisation towards the HRTHE in this manner, and by providing recourse for citizens who feel their right to a healthy environment has been violated.

The Optional Protocol would also enable other state parties under the Covenant to raise concerns about violations of the HRTHE with Australia directly, and with the Committee.[16] The creation of inter-state dialogue could further encourage international scrutiny and accountability, although it is yet to be seen whether this particular mechanism will be embraced by state parties. At the domestic level, in the absence of a federal bill of rights, there would be minimal independent official scrutiny of Australia's compliance with the obligations imposed by the right, due to the lack of implementation of the ICESCR generally. The Australian Human Rights Commission is tasked with a range of statutory responsibilities designed to assist the promotion and protection of human rights in Australia.[17] However, the Commission's human rights mandate is limited by the legislation establishing its powers and functions.[18] As the ICESCR is not incorporated in a schedule to

[12] Ibid.
[13] Poynder, above n 10. The Commonwealth legislation enacting this reform is the *Human Rights (Sexual Conduct) Act 1994* (Cth).
[14] Kate Eastman, 'Australia's Engagement with the United Nations' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters, 2013) 96, 111.
[15] Ibid.
[16] *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, opened for signature 24 September 2009, UN GA Res A/RES/63/117 (entered into force 5 May 2013) art 10.
[17] See generally, *Australian Human Rights Commission Act 1986* (Cth).
[18] Australian Human Rights Commission, *Australian Human Rights Commission Submission to the United Nations Committee on Economic Social and Cultural Rights Review of Australia's Fourth Periodic Report*

the Act, or listed as a relevant international instrument, 'the rights under the ICESCR may not be the subject of a complaint or a self-initiated inquiry or examination of enactment conducted by the Commission, except to the extent that those rights are also incorporated in other treaties within the Commission's statutory mandate'.[19] International legal recognition of the right could help to place pressure on Australia to domestically recognise the right, potentially leading to more effective realisation of the right.

It must be noted however that some critics argue that rather than constituting a benefit for environmental protection, '…"internationalizing" national decision-making in sensitive core areas of traditional state sovereignty' is problematic.[20] This is ultimately a matter of opinion, however it is certain that a persuasive argument can be mounted in favour of increasing international scrutiny of national decision-making which impacts on human rights protection.

5.3.1.2 Learning from international experience

International legal recognition of the right could enable Australia to learn from the experiences of other countries seeking to fulfil the obligations imposed by the right. Considering that ESC rights do not dictate the means by which their ends are to be achieved, it is crucial that states share their experiences to try to devise best practice solutions to the complex and varied challenges involved. In 2014, the United Nations Independent Expert on human rights and the environment, in conjunction with the United Nations Environment Programme, the Office of the High Commissioner for Human Rights, and the Legal Resources Centre of South Africa convened a regional consultation in South Africa examining the relationship between human rights obligations and environmental protection, focussing particularly on constitutional environmental rights.[21] The consultation noted that

on the Implementation of the International Covenant on Economic Social and Cultural Rights (2009) [4.1 (a)] <https://www.humanrights.gov.au/review-australia-s-fourth-periodic-report-implementation-international-covenant-economic-social-and#4_1>.

[19] Ibid.

[20] Günther Handl quoted in Donald K Anton and Dinah L Shelton (eds), *Environmental Protection and Human Rights* (Cambridge University Press, 2011) 140.

[21] United Nations Independent Expert on Human Rights and the Environment with the United Nations Environment Programme, the Office of the High Commissioner for Human Rights, and the Legal Resources Centre of South Africa, *Human Rights and the Environment: Regional Consultation on the Relationship Between Human Rights Obligations and Environmental Protection, with a Focus on Constitutional Environmental Rights* (2014) 23-24 January 2014, Johannesburg, South Africa <http://srenvironment.org/wp-content/uploads/2014/11/Johannesburg-consultation-report-final.pdf>.

there has been a 'proliferation' of constitutional rights around the world, and listed a number of benefits for environmental protection associated with constitutional recognition of environmental rights.[22] However, the consultation also discussed a number of challenges involved in realising these benefits.[23] Prime amongst these challenges was the issue of implementation, due to various causes including inadequate access to information, the degree of technical expertise and institutional capability required, limitations associated with a judicial approach to implementation, issues with judicial independence, court delays and the technical nature of litigation, mobilisation and education of communities, and definitional issues.[24]

The consultation further identified a number of 'good practices' by states in the implementation of constitutional human rights to a healthy environment.[25] Various different forms of good practices were discussed, including 'active constitutional courts that have created a jurisprudence that interprets and applies constitutional environmental rights', 'practices related to improving access to courts, including through broad standing provisions', and 'practices related to providing access to environmental information'.[26] Similarly, in the Independent Expert's mission reports from Costa Rica (2014) and France (2015), he identified a number of good practices associated with each country's implementation of environmental human rights. These included in Costa Rica the legal recognition of the right to a healthy and ecologically balanced environment, the right to access to remedy, and the right to information,[27] and in France, the adoption of the Environmental Charter, recognition of rights to information and public participation, and international cooperation.[28] These 'good practices' provide some indication as to how the

[22] Ibid 6-8.
[23] Ibid 8-10.
[24] Ibid.
[25] Ibid 11-27.
[26] Ibid.
[27] John Knox, Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc A/HRC/25/53/Add.1 (8 April 2014) annex ('*Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment on his Mission to Costa Rica (28 July – 1 August 2013)'*) 6-13.
[28] ; John Knox, Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc A/HRC/28/61/Add.1 (6 March 2015) annex ('*Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment on his Mission to France (20-24 October 2014)'*) 7-17.

right to a healthy environment may be effectively realised within a jurisdiction. As explained by the Independent Expert, although they do not constitute 'best' practices, they demonstrate the variety of laws, policies, and institutional mechanisms that can be utilised to effectively progressively realise the right.[29] By recognising the HRTHE, Australia would have the opportunity to learn from the experience of other countries who have already trialled different mechanisms for achieving progressive realisation of the right in their domestic systems. For instance, in Belgium a 'standstill doctrine' has been developed in response to constitutional recognition of the HRTHE.[30] The doctrine prevents the government from 'weakening levels of environmental protection except in limited circumstances where there is a compelling public interest'.[31] Similar new legal approaches could be adopted in Australia as a means of fulfilling the obligations imposed by the right. As the standstill doctrine and the identified good practices above demonstrate, the effective realisation of environmental rights such as the HRTHE is dependent upon supportive institutional structures. By looking to the experience of other countries, Australia may be able to ascertain the most appropriate institutional and procedural frameworks to support effective implementation of the right.

5.3.1.3 Comparison against an international standard

By creating an international standard for environmental protection, international legal recognition of the right may help to provide an indication of how Australia is performing compared to other jurisdictions. To an extent, domestic environmental protection and management is already measured against international standards through various mechanisms. For instance, attempts have been made at the international and domestic levels to develop indicators to measure the achievement of sustainable development. At the international level, the Commission on Sustainable Development (CSD) produced a set of sustainable development indicators, which have been adopted at the national level in various jurisdictions.[32] The International Institute for Sustainable Development notes that a range of 'organizations such as the OECD, UNSD, UNEP, the World Bank and others' have been involved in the development of sustainable development indicators over the past two

[29] Ibid 7 [24].
[30] Boyd, above n 21, 224.
[31] Ibid.
[32] Department of Economic and Social Affairs, United Nations Secretariat, *Indicators of Sustainable Development: Guidelines and Methodologies* (3rd ed, 2007) <http://www.un.org/esa/sustdev/natlinfo/indicators/guidelines.pdf>.

decades.[33] In 2012, at the Rio+20 Conference on Sustainable Development, participants discussed the need to formulate new sustainable development goals, and associated indicators to measure progress towards their achievement.[34] In 2015, at the United Nations Sustainable Development Summit, a set of Sustainable Development Goals were agreed upon by over 150 state leaders.[35] The United Nations is currently in the progress of developing indicators to measure the realisation of these goals, which will build and expand upon previous efforts to develop international sustainable development indicators.[36]

Progress has also been made at the national level in various jurisdictions, including Australia. The Australian Government has developed a set of sustainability indicators, which aim to provide information about Australia's social/human, natural and economic capital.[37] Although there would obviously be numerous similarities between sustainable development indicators and indicators designed to measure progress towards realisation of the HRTHE (as they both seek to measure to some extent, the achievement of a certain standard of environmental quality), there are some important differences. Principally, these different indicator types seek to measure progress towards the achievement of distinct goals. Sustainable development indicators measure achievement towards the goals of sustainable development, whilst HRTHE indicators would measure state progress towards fulfilling the obligations to protect, respect and fulfil the right.

Australia's environmental performance is also already subject to comparisons against international standards due to Australia's involvement with a wide range of international

[33] Laszlo Pinter, *Measuring Progress Towards Sustainable Development Goals: Working Paper* (2013) International Institute for Sustainable Development, 8 <http://www.iisd.org/pdf/2013/measuring_progress_sus_dev_goals.pdf>.
[34] Ibid 2.
[35] United Nations Development Programme, *World Leaders Adopt Sustainable Development Goals* (25 September 2015) <http://www.undp.org/content/undp/en/home/presscenter/pressreleases/2015/09/24/undp-welcomes-adoption-of-sustainable-development-goals-by-world-leaders.html>.
[36] Division for Sustainable Development, United Nations Department of Economic and Social Affairs, *Indicators in the Transforming Our World – The 2030 Agenda for Sustainable Development* <https://sustainabledevelopment.un.org/topics/indicators>.
[37] It explains that 'social and human capital' means 'skills and education; health; employment; security; institutions, governance and community engagement'; natural capital includes 'climate and atmosphere; land, ecosystems and biodiversity; natural resources; water; waste'; and economic capital refers to 'wealth and income; housing; transport and infrastructure; productivity and innovation': Department of the Environment (Cth), *Sustainability Indicators for Australia* <http://www.environment.gov.au/topics/sustainable-communities/measuring-sustainability/sustainability-indicators>.

environmental law treaties and agreements.[38] For instance, Australia is a party to the *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993), which requires state parties to abide by the provisions of the Convention, engage in regular reporting, and develop national plans for implementation. A project has been developed to help states assess their progress towards achieving biodiversity goals, through the use of biodiversity indicators.[39] Similarly, other international environmental law conventions have processes for ensuring that states comply with international standards.

Accordingly, it may be possible to argue that the creation of HRTHE indicators would be duplicative of various progress indicators utilised under international environmental law agreements. Whilst there would certainly be a significant degree of overlap, it is likely that there would also be important points of distinction. Moreover, where there are overlapping obligations, the addition of HRTHE indicators to the landscape could help to strengthen and co-ordinate Australia's efforts towards compliance with its various international environmental law obligations.

5.3.2 Potential realisation of the identified benefits in the Australian water management context

As identified, there are various potential benefits for environmental protection associated with international legal recognition of the right. These include, increased scrutiny of Australia's environmental protection performance, the ability to benefit from international experience with the implementation of the right, and comparison against an international standard. This section aims to determine the extent to which these potential benefits may be realised in the case study context of water resources management in the Murray-Darling Basin in Australia.

As argued above, it is possible that international legal recognition of the right may result in increased scrutiny of Australia's environmental protection systems. Accordingly, it may

[38] For a list of relevant treaties, see: Department of Foreign Affairs and Trade (Cth), *Environment and Sea Law* <http://dfat.gov.au/international-relations/themes/environment-sea-law/pages/environment-and-sea-law.aspx>.
[39] Biodiversity Indicators Partnership, *The Indicators* <http://www.bipindicators.net/>.

increase scrutiny of the systems in place to manage Australia's water resources, and the degree to which Australia is taking steps to realise the right in this context. Whilst there is no international authoritative statement outlining the state obligations imposed by the HRTHE, as explained earlier, it is possible to ascertain certain potential aspects of the right's content. Utilising this content, a number of potential obligations were identified. The obligations outlined require that states facilitate sustainable environmental management in order to ensure that a minimum standard of environmental health is maintained both at present and into the future. Applied to the water context, this may accordingly impose an obligation on states to provide a law and policy framework for sustainable water resources management. In order to ensure its effectiveness, states would also need to ensure that the laws and policies were adequately monitored and enforced.

It was also explained that the right may impose an obligation requiring states to ensure a minimum standard of environmental quality. Applied to the water context, this may place an obligation on states to ensure adequate standards of water quality and water ecosystem health. If there is a minimum standard of environmental health, there must therefore be a minimum standard of water quality which extends beyond simply a level of water quality adequate for direct human survival needs. The obligation may extend to ensuring a standard of water quality that enables the maintenance of ecological health at present and into the future. In order to enforce these standards, it may be necessary for the public to be able to gain adequate information about water quality, and to participate in and challenge decisions affecting water quality. However, ensuring adequate water quality may only partially fulfil the potential obligations imposed by the HRTHE. In order to achieve sustainability of the resource and the maintenance of ecological health, it may be necessary for states to ensure that there are adequate supplies of freshwater to satisfy the needs of not only humans, but also non-human animals and the environment itself. Whilst the human right to water focusses on ensuring that human beings have access to 'sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses',[40] the HRTHE has a broader focus. It seeks to ensure that all of humanity has access to a natural environment which is capable of sustaining human life. Accordingly, the right may impose

[40] *General Comment No. 15: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UNCESCR, 29th sess [5], E/C.12/2002/11 (2002), para 2.

upon states an obligation to ensure adequate supplies of freshwater to satisfy the water needs of humans, non-human animals and the environment at present and into the future.

Accordingly, in addition to the general obligations identified earlier to provide legal recognition of the right and to create a national strategy for implementation, the right may also impose certain specific obligations on states in the water resources context. Namely, an obligation to provide a legal and policy framework for sustainable water resources management, an obligation to ensure adequate standards of water quality and water ecosystem health, and an obligation to ensure adequate supplies of freshwater to satisfy the water needs of humans, non-human animals, and the environment at present and into the future. Although it is not yet possible to ascertain Australia's progress towards realisation of the right, if these obligations are held to be imposed by the right, it can be seen that Australia is already taking steps towards the fulfilment of these obligations in the water resources management context. However, if the HRTHE was recognised, the adequacy of these steps would become a matter for international scrutiny and debate.

Recognition under the ICESCR, would mean that the UNCESCR would be tasked with monitoring Australia's realisation of these obligations. Accordingly, Australia's progress towards achieving the obligations in relation to water resources management would be subject to the reporting and review processes operated by the Committee. Whilst the Committee's views cannot force states to change their behaviour, they can encourage an international dialogue on the adequacy of state practices. By recognising the right at the international level, Australia could join an international conversation on how best to fulfil the right's obligations in this context. Addressing the myriad challenges raised by water resources management is a complicated governance task. Facilitating international sharing of information about how to best address these challenges could be beneficial for improving environmental protection in this context. However, it is questionable to what extent this would prove beneficial, given that Australia is already able to engage with expertise on comparative water resources management. The United Nations has developed an 'inter-agency coordination mechanism for all freshwater related issues', known as UN Water.[41] UN-Water regularly releases guidance to help facilitate information sharing on water governance mechanisms between states. For instance, they recently released a compendium

[41] UN-Water, *About UN-Water* <http://www.unwater.org/about/en/>.

outlining various water quality regulatory frameworks adopted in different jurisdictions, in order to assist decision-makers and others involved in water governance by helping them to learn from the successes and challenges of different approaches.[42] Accordingly, it can be seen that there are already mechanisms in place to facilitate state peer learning in this regard.

Despite this limitation, it is possible that enabling Australian citizens to compare Australia's performance could support calls for improved environmental protection. If the right is recognised at the international level in the future, it may lead to the elucidation of international benchmarks regarding the particular obligations identified. The application of human rights indicators could reveal areas where Australia is fulfilling to take adequate steps according to its resources to realise the right. This would strengthen calls for improvement, as increased environmental protection measures could be characterised as necessary for adequately meeting human rights obligations. As noted earlier, some of the benefits associated with the use of human rights indicators are their capacity to facilitate comparative state reporting, create 'interstate peer pressure',[43] provide 'feedback on the outcomes of state policy', 'inform decision making' and 'suggest areas for future policy change at the government level'.[44]

However, the United Nations is already in the process of developing indicators to measure progress towards a Sustainable Development Goal ('SDG') which is focussed specifically on water and water management. The SDG requires states to 'ensure availability and sustainable management of water and sanitation for all'.[45] A number of the targets identified to achieve this goal align with the outlined potential obligations of the HRTHE. For instance, one of the targets requires states to 'protect and restore water-related ecosystems' by 2020.[46] Whilst another sets a target of improving water quality.[47] However, as noted earlier, there are differences between the goals, indicators and targets utilised for SD indicators, in comparison to those that would be used for HRTHE indicators. Accordingly, whilst the predicted degree of overlap does seem to be inevitable in this context, it does not mean that

[42] UN-Water, *Compendium of Water Quality Regulatory Frameworks: Which Water for Which Use?* (2015) <http://www.unwater.org/publications/publications-detail/en/c/357645/>.
[43] Welling, above n 121, 941.
[44] Ibid 944.
[45] UN-Water, *Monitoring Water and Sanitation in the 2030 Agenda for Sustainable Development: An Introductory Guide* (2016) 3 <http://www.unwater.org/publications/publications-detail/en/c/379864/>.
[46] Ibid 5.
[47] Ibid 4.

HRTHE indicators would be rendered redundant. Moreover, HRTHE indicators have the benefit of seeking progress towards the fulfilment of human rights obligations, as opposed to aspirational development 'goals'.

It is possible that as a result of the international dialogue created by human rights indicator progression evaluation, Australia may enter into agreements with other countries at the international level to adopt strategies to better enable Australia to meet international benchmarks and targets. For instance, Australia could be party to an agreement to reduce water consumption by a certain percentage by a certain date. Alternatively, it could agree to better facilitate access to justice in decision-making concerning water management. The potential impacts created by international peer pressure should not be underestimated. To an extent, international agreements on measures to improve freshwater governance and the management of water environments already exist. Relevant international documents include the *Ramsar Convention* (*Convention on Wetlands of International Importance*)[48] and the International Law Association's 2004 *Berlin Rules on Water Resources* ('*Berlin Rules*').[49]

The *Berlin Rules* are of particular relevance as unlike most international water law documents, the *Berlin Rules* include state duties in relation to domestic freshwater sources which are not transboundary. The *Rules* 'express the entire body of customary international law applicable to the management of waters'.[50] Various articles are of relevance to the relationship between Australia's international law obligations and domestic water resources management. Reviewing these customary international law obligations relating to freshwater governance, it can be seen that Australia is already potentially subject to various obligations which may also be imposed by recognition of the HRTHE.[51] For instance, it was argued earlier that the HRTHE may impose an obligation to manage waters sustainably, which reflects the obligation contained under Article 7 of the *Rules*. Article 27 contains an obligation to 'prevent, eliminate, reduce, or control pollution in order to minimize environmental harm', and Article 28 imposes an obligation to 'establish water quality standards sufficient to protect public health and the aquatic environment and to provide

[48] *Convention on Wetlands of International Importance especially as Waterfowl* Habitat, opened for signature 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975). Australia is a Contracting Party to the Convention.
[49] International Law Association, *Berlin Rules on Water Resources* (2004) 71 ILA 337.
[50] Ibid 8.
[51] For instance, Articles 4, 5, 6, 7, 8, 17, 18, 22, 23, 24, 26, 27, 28, and 69.

water to satisfy needs'. Both of these obligations were argued to form part of the obligations imposed by the HRTHE.

Accordingly, it could be argued that international legal recognition of the HRTHE adds little to Australia's existing obligations under international law in relation to water resources management. However, arguably recognition of these obligations as components of a broader human rights obligation to protect, respect and fulfil the human right to a healthy environment as a Covenant right may prove more effective than recognition as customary international law obligations. Moreover, there would inevitably be distinctions between the content of the HRTHE as applied to water resources management and the content of existing customary international law obligations relating to freshwater governance. In fact, it could be argued that international legal recognition of the HRTHE could help to strengthen and operationalise these obligations, insofar as they complement the obligations imposed by the right.

5.4 Limitations of international legal recognition of the right for environmental protection in Australia

Despite the various potential benefits outlined above, international legal recognition of the HRTHE may have a limited impact on Australian environmental protection. This is due to three main areas of limitation. Firstly, the fact that the right may impose obligations that are already largely addressed under international environmental law. Secondly, the fact that a number of the identified benefits for environmental protection area already being released through other mechanisms. And finally, the fact that Australia has a record of failing to abide by various international human rights obligations which have not been translated into domestic legislation.

In regards to the first area of limitation, as noted above, Australia is already party to numerous hard and soft law international environmental law agreements. These agreements span a range of environmental issue areas, including climate change, biodiversity conservation, and marine protection. Accordingly, it is possible that the vast majority of the obligations imposed by recognition of the HRTHE are already captured under Australia's international environmental law obligations. The main point of distinction lies in the available remedies and institutional monitoring and accountability mechanisms for human rights obligations vis a vis international environmental law obligations. Handl has criticised the prospect of international legal recognition of the HRTHE on the grounds that it would focus attention away 'from the task of building upon already existing structures and mechanisms' under international environmental law, and would 'result in duplicative efforts' for less gain than would be associated with other possible reforms (such as for example, 'enhancing the formal status of NGOs within existing fora and processes').[52] However, in response Rodriguez-Rivera argues that the right should be viewed as 'complimentary [sic] to international environmental law and not as a parallel or alternative scheme.'[53] He argues that rather than being 'redundant', the right would in fact 'fill a gap' in international environmental law.[54] Accordingly, whilst it is undeniable that the right would in some respects operate in a duplicative manner with existing obligations under

[52] Günther Handl quoted in Luis E Rodriguez-Rivera, 'Is the Human Right to Environment Recognized Under International Law? It Depends on the Source' (2001) 12 (1) *Columbia Journal of International Environmental Law and Policy* 1, 35.
[53] Rodriguez-Rivera, ibid.
[54] Ibid.

international environmental law, it may also complement and address gaps in international environmental law.

The second area of limitation concerns the fact that a number of the benefits associated with international legal recognition for environmental protection are already being realised through other mechanisms. For instance, Australia is already able to learn from the comparative environmental governance experiences of other countries. It is also already subject to comparisons against international standards in terms of evaluating environmental protection performance. However, there may be distinct additional benefits associated with facilitating international peer learning, and increased international scrutiny via the mechanism of the HRTHE. For instance, recognition of the right at the international level may lead to the elucidation of international benchmarks for achieving realisation of the right at the domestic level, which could help to reveal areas where Australia is falling short of international standards. Accordingly, there could be benefits associated with the implementation of human rights indicators for the HRTHE which are not associated with indicators designed to measure Australia's progress towards sustainable development goals.

In regards to the third area of limitation, the Australian Government has been criticised on a number of occasions for its failure to respect its international human rights obligations, particularly with regards to the rights of refugees and asylum seekers (discussed earlier). Obligations which have been translated into domestic legislation have enjoyed a greater degree of fulfilment and compliance (such as obligations to prohibit discrimination on the basis of race and gender). Accordingly, in the absence of domestic recognition of the right, it is uncertain the extent to which the Australian Government will make progress towards fulfilment of the obligations imposed by the HRTHE. Although, as argued above, even a failure to adequately take steps towards realisation could result in benefits for environmental protection, as it may increase international pressure and scrutiny on Australia.

The next section considers the possible options for domestic legal recognition of the right, and the potential benefits it may have to offer environmental protection.

5.5 Options for domestic legal recognition of the right in Australia

As explained earlier in Chapter Four, the HRTHE is not expressly recognised in the *Commonwealth Constitution*, or in any of the state constitutions or territory self-governing legislation. It is similarly absent from federal and state/territory human rights legislation. There are various options available for legal recognition of the human right to a healthy environment in Australia.[55] Eleven options for legal recognition of the right will be explored over the course of the subsequent two chapters (summarised in Table 1 overleaf).

The first set of options (1-5) address the possibilities for constitutional recognition of the right in Australia. As noted earlier in Chapter Three, globally there has been a trend towards constitutional recognition of the right. Chapter Six aims to ascertain whether it would be possible for the right to be recognised in the Commonwealth Constitution, state constitutions and territory self-governing legislation. Four different options for Commonwealth constitutional recognition are considered – recognition of the right under a bill of rights, recognition in the Constitution's preamble, recognition in a new section of the Constitution, or recognition in an existing section.

The second set of options (6-11) address the possibilities for legislative recognition of the right in Australia. As noted in Chapter One, there is a need for further research into the utility of legislative versions of the HRTHE. Three options for Commonwealth legislative recognition are explored, including express legislative recognition of the right within a bill of rights, implied recognition within a bill of rights, and specific legislation recognising the HRTHE. Three options for state/territory legislative recognition are also considered. Namely, recognition of the right in state/territory bill of rights legislation as either an express or implied right, and recognition within specific HRTHE legislation.

[55] Rowena Cantley-Smith has considered a number of these potential options, and outlined various possible ways to incorporate a human right to a healthy environment into Australian law: Rowena Cantley-Smith, 'A Human Right to a Healthy Environment' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters, 2013) 447, 472-473.

Table 1: Options for Legal Recognition of the Human Right to a Healthy Environment in Australia

	Federal	State/Territory
Constitutional	**Option One (Bill of Rights)** Recognition of the HRTHE within the context of a constitutionally entrenched bill of rights, as either an independent right or a derivative right.	**Option Five** Recognition of the HRTHE within state constitutions and territory self-governing legislation.
	Option Two (Preamble) Recognition of the HRTHE within the preamble of the *Commonwealth Constitution*.	
	Option Three (Existing Chapter) Recognition of the HRTHE within an existing chapter of the *Constitution*.	
	Option Four (New Section) Recognition of the HRTHE within in a new section of the *Constitution*.	
Legislative	**Option Six (Bill of Rights – Express Recognition)** Express recognition of the HRTHE within a statutory bill of rights at the federal level.	**Option Nine (Bill of Rights – Express Recognition)** Recognition of the HRTHE within the context of existing or new statutory bills of rights at the state/territory level.
	Option Seven (Bill of Rights – Implied Recognition) Implied recognition of the HRTHE within a statutory bill of rights at the federal level.	**Option Ten (Bill of Rights – Implied Recognition)** Recognition of the HRTHE in state/territory bills of rights legislation as an implied right.
	Option Eight (Specific Legislation) Legislative recognition of the HRTHE within specific federal HRTHE legislation.	**Option Eleven (Specific Legislation)** Recognition of the HRTHE within specific HRTHE legislation at the state/territory level.

5.6 Possible expression of the right

If the right was not recognised at the international level, yet Australia chose to recognise a form of human right to a healthy environment at the domestic level, it would have to decide on the expression of the right. There are various possible forms of expression Australia could adopt. For instance, in Latvia, the right is expressed as a right to live in a 'benevolent environment',[56] whilst in Mexico, citizens are granted a right to an 'appropriate ecosystem for their development and welfare'.[57] The way in which the right is expressed can have significant implications for its content. As there is no definitive expression of the right at the international level, significant debate exists as to the relative benefits of the possible forms of expression. As noted by Shelton, various 'implications [emerge] from the different adjectives' employed to express the right, such as: ''healthy', 'safe', 'secure' or 'clean''.[58] Collins argues that the most appropriate 'modifier' for the right is the phrase 'healthy and ecologically balanced'.[59] She advocates for this term on the basis that the word healthy 'responds most directly to environmental contamination causing direct human health effects' and the term 'ecologically balanced' addresses the destruction of natural habitats.[60]

Atapattu argues that the right should be framed as a right to a 'healthy' environment.[61] He prefers this formulation for various reasons, including the fact that it is 'easier to establish' and has the requisite flexibility to adapt to different situations.[62] However, agreeing that the preferable terminology is a right to a healthy environment, raises further definitional questions. In particular, what is a 'healthy environment', and what standard of environmental quality does it guarantee? To answer these questions, it may be possible to draw guidance from international law agreements and declarations pertaining to the relationship between human rights and the environment. In order to do this, Wolfe considered the statements made in the *Draft Principles.*[63] However, she found that the *Principles* do not provide an 'indication of a standard for what constitutes "a secure, healthy and ecologically sound

[56] *Constitution of Latvia*, art 115.
[57] *Political Constitution of the United Mexican States*, art 4.
[58] Dinah L Shelton (ed), *Human Rights and the Environment Volume I* (Edward Elgar, 2011), x.
[59] Lynda Margaret Collins, 'Are We There Yet? The Right to Environment in International and European Law' (2007) 3 (2) *McGill International Journal Sustainable Development Law & Policy* 119, 137.
[60] Ibid.
[61] Sumudu Atapattu, 'The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law' (2002) 16 *Tulane Environmental Law Journal* 65, 111.
[62] Ibid.
[63] *Draft Declaration of Principles on Human Rights and the Environment*, Fatma Zohra Ksentini, Special Rapporteur, UN Doc E/CN.4/Sub.2/1994/9 (1994) annex 1.

environment".[64] Similarly, other relevant statements from the international community fail to outline a standard which could be adopted at the national level.

Whilst recourse may be made to science in order to ascertain a theoretically objective scientific standard, it is impossible to avoid value judgements in the standard-making process. Value judgements are involved at every stage of the process, including how the right is expressed, how the standard is defined, and how compliance is assessed.[65] As noted by Anderson, 'perceptions of the environment are culturally informed'.[66] Inevitably therefore, significant cultural divergence will exist over the meaning of 'clean' and 'healthy' in the environmental context. Defining the right at the national level may therefore accordingly be more appropriate as it allows for divergence between cultural conceptions of the human-environment relationship. Supporting this argument, Nickel argues that a lack of guidance at the international level may not be problematic. He contends that '[e]ven if it were possible to give a more precise description of the level of acceptable risk, it probably would be inappropriate for international institutions to prescribe a single, precise standard worldwide'.[67] For this reason, he argues that '[r]isk standards should be specified further at the national level through democratic legislative and regulatory processes, in light of current scientific knowledge and fiscal realities.'[68] In a similar vein, Kiss and Shelton advocate against the delineation of a general definition and support letting 'human rights supervisory institutions and courts develop their own interpretations, as they have done for many other human rights'.[69] However, as Boyle notes, this raises an important question over the advisability of allowing courts to act as the arbiters of the standard (an issue which will be explored further below in Chapters Six and Seven).[70]

---

[64] Karrie Wolfe, 'Greening the international human rights sphere? Environmental rights and the Draft Declaration of Principles on Human Rights and the Environment' (2003) 9 *Appeal, Review of Current Law and Law Reform* 45, 51.
[65] As noted by Boyle, '[w]hat constitutes a decent environment is a value judgement, on which reasonable people will differ': Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 (3) *The European Journal of International Law* 613, 626.
[66] Michael Anderson, 'Human Rights Approaches to Environmental Protection: An Overview' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press, 1998) 1, 13.
[67] Nickel, James W, 'The Human Right to a Safe Environment: Philosophical Perspectives on Its Scope and Justification' (1993) 18 *Yale Journal of International Law* 281, 285.
[68] Ibid.
[69] Kiss and Shelton cited in Boyle, Alan, 'Human Rights and the Environment: A Reassessment' (2010) 33 <http://www.unep.org/environmentalgovernance/Portals/8/documents/Events/HumanRightsEnvironmeHuman.pdf>.
[70] Boyle, ibid.

Another crucial definitional question pertains to the meaning of the term 'environment'. As May and Daly ask, '[d]oes the noun "environment" mean human environment, natural environment, or both?"[71] For the purposes of this thesis, the environment will be defined to mean the 'environment' (natural and man-made) in which humans live, as this definition appears to be most consistent with the focus of the Covenant rights from which the HRTHE may be derived under international law. However, ultimately the definition of the 'environment' for the purposes of a constitutional or legislative provision will depend upon the degree of definition of the term within the document recognising the right, and the manner in which the term is interpreted by the courts.[72]

From the foregoing discussion it can be seen that deciding upon the appropriate expression of the right is a complicated task, which can have significant implications for the interpretation and operation of the right. Arguably, the optimal expression of the right is characterisation of the right as a 'right to a healthy environment' as that form of expression best captures the identified possible content of the right at the international level. If Australia opts to recognise the right, it is likely to utilise the terminology adopted at the international level.

[71] James R May and Erin Daly, 'Vindicating Fundamental Environmental Rights Worldwide' (2009) 11 *Oregon Review of International Law* 365, 370.
[72] For a discussion of how courts have interpreted the term 'environment' contained in environmental rights declarations in other jurisdictions, see: James R May and Erin Daly, *Global Environmental Constitutionalism* (Cambridge University Press, 2015) 91-93.

5.7 Potential benefits for environmental protection associated with domestic legal recognition of the right in Australia

This section considers whether legal recognition of the right at the domestic level has the potential to provide an effective means of assisting Australia to achieve environmental protection. As noted by Boyle, there is an important distinction to be made between recognising a relationship between the protection of human rights and the protection of the environment, and making a claim that recognising a human right to a healthy environment is a useful means of achieving environmental protection.[73] He explains that '…while it may be true that adequate environmental quality is an essential condition for the enjoyment of human rights, it is less obvious that a substantive human right to environmental quality is an essential condition for the protection of the environment.'[74] This is a crucial distinction to draw, as it is possible that legal recognition of the right to a healthy environment may not provide any significant benefits for environmental protection. Redgwell argues that under a 'strong rights-based approach…it could be argued that recognition of rights becomes an end in itself'.[75]

Conversely, the aim of this thesis is to explore whether legal recognition of the right can constitute an effective *means* of achieving the *ends* of environmental protection. Whilst it would obviously be unrealistic to expect one mechanism to address all of the causes and consequences of the various challenges facing environmental protection, it is useful to consider how domestic legal recognition of the human right to a healthy environment might be utilised as a means of improving and aiding environmental protection to some extent. As it is not possible for the thesis to consider all of the potential benefits for environmental protection associated with domestic legal recognition of the HRTHE, the thesis will be restricted to consideration of whether domestic legal recognition is capable of realising a set of potential benefits.

[73] Alan Boyle, 'The Role of International Human Rights Law in the Protection of the Environment' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press, 1998) 43, 57.
[74] Ibid.
[75] Catherine Redgwell, 'Life, the Universe and Everything: A Critique of Anthropocentric Rights' in Alan E Boyle and Michael R Anderson (eds), *Human Rights to Approaches to Environmental Protection* (Clarendon Press, 1998) 71, 83.

The following set of potential environmental protection benefits has been selected:

1. Emphasis on the fundamental importance of the interrelationship between human health and wellbeing and the state of the natural environment;
2. Stronger basis for environmental laws and policies;
3. Increased prioritisation of environmental protection considerations in government decision-making;
4. Safeguards against environmental protection rollbacks;
5. Safety net by filling gaps in environmental legislation;
6. Avenues to bring legal actions in the interests of environmental protection;
7. Inform environmental quality standards.

As noted in Chapter One, the rationale for the selection of these benefits is twofold. Firstly, a number of these benefits have been associated with domestic legal recognition of the right in other jurisdictions.[76] Accordingly, it is relevant to consider whether Australia might enjoy a similar experience.[77] Secondly, as this chapter argues, these benefits all address key aspects of the goals of ESD, and assist in addressing some of the key challenges for environmental protection discussed earlier. The following section considers how each of these potential benefits may be realised through domestic legal recognition of the right, and how they may constitute benefits in the Australian context according to the definition of benefits adopted in Chapter One. Chapters Six and Seven then consider how these potential benefits may be realised in the Australian context, under different forms of legal recognition.

[76] Boyd's research has confirmed the realisation of the following benefits for environmental protection associated with domestic constitutional recognition of the right: stronger environmental laws, creation of a safety net to close gaps in environmental law, the prevention of rollbacks on environmental protection, improved implementation and enforcement of environmental laws and policies, promotion of environmental justice, increased public involvement in environmental governance, increased governmental accountability, the creation of a level playing field with social and economic rights, and improved environmental education: David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (UBC Press, 2012) 27-32.

[77] In Chapter Seven of David R Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (UBC Press, 2012), Boyd explores how a number of the benefits experienced in other jurisdictions may be realised if Canada provided constitutional recognition of the right. In particular, he considers its ability to strengthen environmental laws, improve enforcement of environmental laws and prevent environmental law rollbacks.

5.7.1 Emphasis on the fundamental importance of the interrelationship between human health and wellbeing and the state of the natural environment

One of the most significant potential benefits of legal recognition of the right is its ability to change the way the environment is valued and the way environmental protection is prioritised against competing interests. The right places emphasis on the fundamental importance of the interrelationship between human health and wellbeing and the state of the natural environment. Explicit recognition of this linkage at the policy level could operate as an important precursor to more significant recognition in law and practice. As noted earlier in Chapter Two, there are various political challenges facing environmental protection in Australia relating to differing views on the nature of the human/environment relationship, and differing views on the value and role of the environment. It is possible that through placing emphasis on the importance of the interrelationship, domestic legal recognition of the right could help to address these issues to some extent. Accordingly, this possible consequence of domestic legal recognition can be characterised as a benefit for environmental protection in Australia. Chapters Six and Seven will consider how this particular benefit may be realised through constitutional and legislative recognition of the right.

5.7.2 Stronger basis for environmental laws and policies

Domestic legal recognition of the right in other countries has been found to provide a stronger basis for environmental laws and policies.[78] In Australia, domestic recognition may achieve this effect via direct impact on legislative power (for instance, where the right receives constitutional recognition), or through to its ability to justify arguments for the enactment and/or retention of environmental laws and policies. This could help to address challenges for environmental protection related to political disagreements over the necessity of environmental protection measures. Being able to justify laws and policies on the basis of a human rights mandate, could help to strengthen calls for government action on environmental protection. As noted earlier in Chapter Two, various commentators advocate for reform to Australia's environmental protection laws and policies. Accordingly, increasing legislative power and/or political pressure to enact law reform could be perceived as a potential benefit for environmental protection in Australia.

[78] Boyd, above n 76, 233.

5.7.3 Increased prioritisation of environmental protection considerations in government decision-making

Domestic legal recognition of the right has the potential to elevate the status of environmental protection claims above claims made on behalf of other interests. As noted by legal philosopher Ronald Dworkin, rights claims can operate as 'trumps' in the legal system.[79] Huffman argues that it is this aspect of rights claims that makes them 'attractive to nature advocates' as they have the ability to trump 'ordinary political decisions'.[80] Anderson argues that both human rights law and environmental law seek to utilise this 'trump' capacity. He claims that both areas of law have a 'hidden imperial ambition' as they 'both potentially touch upon all spheres of human activity, and claim to override or trump other considerations'.[81] Accordingly, one of the potential benefits for environmental protection associated with the characterisation of environmental protection as a human 'right' is the increased weight such characterisation may give to environmental considerations in government decision-making.[82] There may be particular advantages to using the language of rights when arguing for a heavier weighting of environmental criteria in decision-making where human rights claims or human property interests are at issue.[83] Couching environmental protection in the well-known and politically powerful language of human rights may be more effective in elevating the status of environmental issues, than more traditional regulatory language.

Boyle argues that '[l]acking the status of a right means that the environment can be trumped by those values which have that status, including economic development and natural resource exploitation.'[84] In other words, by raising environmental protection to the status of a right, it may help environmental protection considerations to compete on a more even footing with other competing interests. Hiskes provides a persuasive argument for the

[79] Ronald Dworkin cited in James L Huffman, 'Do Species and Nature Have Rights?' (1992) 13 *Public Land Law Review* 51, 56.
[80] Huffman, ibid, 75.
[81] Anderson, above n 66, 1.
[82] A similar rationale has been utilised for the proposed adoption of nature rights approaches to environmental protection. In response to Christopher Stone's proposal to represent the interests of natural entities using the protection of 'rights', Elder argued that Stone's proposal essentially seemed to be aimed at providing a justification for granting a 'heavier weighting of environmental criteria' in decision-making: P S Elder, 'Legal Rights for Nature - The Wrong Answer to the Right(s) Question' (1984) 22(2) *Osgoode Hall Law Journal* 285, 291.
[83] See further, Christopher Stone, 'Response to Commentators' (2012) 3 *Journal of Human Rights and the Environment* 100, 104.
[84] Boyle, above n 65, 629.

benefits of the rhetoric of rights talk for environmental protection, contending that 'environmentalism needs a new and more muscular political vocabulary grounded in today's central political ideas of human rights and justice'.[85] He argues that through using the language of human rights, arguments for environmental protection can be 'rooted in these power words of contemporary politics' in order to ensure that they 'cannot be ignored in any election or by any government'.[86]

As identified in Chapter Two, ensuring that an adequate balance is achieved between sometimes competing social, economic and environmental interests in environmental decision-making is a significant challenge facing environmental protection in Australia. Accordingly, if domestic recognition of the HRTHE is capable of assisting in improving the consideration of environmental protection considerations in government decision-making it could be characterised as a benefit for environmental protection.

5.7.4 Safeguards against environmental protection rollbacks

As the right is universal and inalienable, it may set a certain standard of environmental quality which must be maintained. Accordingly, if a government sought to pursue a course of action which could jeopardise the maintenance of this standard, it is possible that the right could operate to prevent such a 'rollback' on environmental protection.[87] Conca has cautioned however that this approach may 'settle for a minimum standard'.[88] He asks whether it merely guarantees 'just enough clean water and breathable air to survive – rather than a call for distributive justice?'[89] However, arguably, it is precisely this minimum standard setting role that could significantly benefit environmental protection. In a US case considering the application of a constitutionally recognised state right to a certain standard of environmental quality, the Court was asked to consider whether the constitutional protection had been violated by a rollback on environmental protection which resulted in

[85] Richard P Hiskes, *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice* (Cambridge University Press, 2009), 2.
[86] Ibid.
[87] Boyd, above n 76, 27-32.
[88] Ken Conca, 'Environmental Human Rights: Greening "The Dignity and Worth of the Human Person"' in Peter Dauvergne (ed), *Handbook of Global Environmental Politics* (Edward Elgar, 2nd ed, 2012) <http://search.credoreference.com/content/entry/elgargep/environmental_human_rights_greening_the_dignity_and_worth_of_the_human_person/0?id=10944418>.
[89] Ibid.

decreased water quality.[90] The legislation in question involved an amendment that created 'a blanket exception to requirements governing discharges from water wells without regard to the degrading effect that the discharges would have on the surrounding or recipient environment'.[91] The Court concluded that this rollback on environmental protection did implicate the right.[92] If the right enjoyed a similar operation in Australia, it could potentially assist in the achievement of ecologically sustainable development. ESD requires that the community's resources and ecological processes on which life depends are to be *maintained* (discussed above in Chapter Two). Accordingly, by providing a mechanism to ensure that a minimum level of environmental health is maintained, domestic legal recognition of the right could help to contribute to the realisation of ESD.

5.7.5 Safety net by filling gaps in environmental legislation

Where existing laws and regulations provide inadequate protection to fulfil the standards set by the right or fail to secure vital procedural rights, the right could be used as a means of 'filling gaps' in relevant legislation.[93] In this vein, Anderson argues that a 'robust environmental right can mobilize redress where other remedies have failed', and 'may serve as the ultimate 'safety net' to catch legitimate claims which have fallen through the procedural cracks of public and private law.'[94] The extent to which this would operate in practice is largely dependent on the form of legal recognition adopted. However, if the right did perform this function it could benefit environmental protection by identifying and addressing environmental protection issues which were being inadequately addressed and regulated.

5.7.6 Avenues to bring legal actions in the interests of environmental protection

Another possible benefit for environmental protection associated with recognition of the right is the potential for increasing public participation and accountability in environmental management.[95] Whilst the value of public participation in environmental decision-making is

[90] *Montana Environmental Information Center et al v Department of Environmental Quality* 260 Mont. 207, 988 P.2d 1236 (1999) cited in Shelton, above n 3, 24.
[91] Ibid.
[92] Ibid.
[93] Boyd, above n 76, 235.
[94] Anderson, above n 66, 22.
[95] Boyd, above n 76, 239-243.

to an extent contested, it is widely considered to be an important aspect of ecologically sustainable development.[96] One way that recognition of the right may increase public participation and accountability, is by increasing the potential avenues available for bringing legal actions on environmental protection grounds. At present, there are various barriers facing public interest litigants in Australia, including costs and standing.[97] Eurick notes that in certain jurisdictions, 'the right has broadened standing requirements allowing citizens to enforce environmental concerns based on the right to a healthful environment.'[98] However, whether this is viewed as a benefit for environmental protection is ultimately a question of perspective.

There is the possibility that taking individual claims to court could, as Brandis was quoted earlier as warning, change 'an argument about social benefit to an argument about individual claims'.[99] Arguably however, there are distinct benefits associated with enabling individuals to bring individual claims to pursue improved environmental protection. Further concerns regarding expansion of standing relate to the spectre of the highly litigious public interest litigant. However, these concerns must be tempered by recognition of the practical impediments to bringing an action - namely, costs and time. Additionally, the 'floodgates' argument has rarely borne out in practice in other jurisdictions where such provisions have been implemented.[100] Some of Australia's most important environmental jurisprudence has

[96] For instance, improving public participation in environmental management and protection is one of the aims of Australia's *National Strategy for Ecologically Sustainable Development*: Department of the Environment (Cth), *National Strategy for Ecologically Sustainable Development 1992* <http://www.environment.gov.au/about-us/esd/publications/national-esd-strategy>.

[97] The Environment Defenders Office (Vic) Ltd (now 'Environmental Justice Australia') has released a report explaining why environmental defenders require public costs protection in environmental litigation. The Report explains that '[u]ntil recently, there were two major barriers to the ability of individuals to challenge improper government decisions', namely, 'the doctrines of standing and costs'. The Report argues that the extended standing provisions under the EPBC Act have 'largely remedied' the problem at the federal level. However, as is explained in Chapter Seven, there are proposals afoot to remove this extended standing. The Report argues that 'costs are now the major barrier to environmental litigation in Australia' as they 'price the vast majority of ordinary people and environmental groups out of the courts'. The Report argues that this is problematic for environmental protection as it means that cases legitimately challenging government decision-making may not make it to court, which could mean that 'the quality of those decisions may suffer; laws may, in effect, be selectively enforced; and ultimately the ability to hold government accountable for its actions is undermined': Rupert Watters, *Costing the Earth? The Case for Public Interest Costs Protection in Environmental Litigation* (2010) Environment Defenders Office (Victoria) Ltd 6 <https://envirojustice.org.au/sites/default/files/files/Submissions%20and%20reports/protective_costs.pdf>.

[98] Janelle P Eurick, 'The Constitutional Right to a Healthy Environment: Enforcing Environmental Protection Through State and Federal Constitutions' (1999-2001) 11 *International Legal Perspectives* 185, 187.

[99] George Brandis, 'The Debate We Didn't Have to Have: The Proposal for An Australian Bill of Rights' (2008) 15 *James Cook University Law Review* 24, 37.

[100] For example, the Australian Capital Territory Economic, Social and Cultural Rights Research Project has stated that '[t]he first six years of operation' of the *Human Rights Act 2004* (ACT) 'have shown that it has not led to a flood of litigation, vexatious or otherwise': Australian Capital Territory Economic, Social and

been the result of concerned citizens or groups bringing legal actions in the public interest (or sometimes, in their own personal interest), to challenge actions or omissions of the government.[101] Providing an additional legal tool to aid this work could be conceived as a benefit for environmental protection, if one of the key challenges for achieving ecologically sustainable development is identified as inadequate enforcement of environmental standards.

The significance of broadened standing rules is particularly pronounced where standing reform is accompanied by the creation of new causes of action. Further to this point, Eurick notes that 'in some circumstances, the right has provided citizens with new causes of action to enforce environmental protection' and 'allowed courts to devise new remedies for addressing environmental problems.'[102] In relation to this 'expansion of rights-based litigation', Anderson argues that it 'may well displace other forms of legal remedy, such as tort law or negotiated settlements, which are better suited to environmental issues.'[103] Although this is a possibility, it is arguable whether other forms of legal remedy are necessarily better suited to environmental issues. Moreover, it is not necessarily the case that litigants would utilise a human rights claim to the exclusion of pursuing other available remedies. However, certainly legal recognition of the right, if accompanied by broadened standing and the creation of new causes of action, could alter the role of the judiciary in relation to the resolution of environmental disputes. For example, Eurick notes that in some countries which have provided constitutional recognition of the right, the right has 'served as a check on legislative actions that affect the quality of the environment.'[104] This places significant discretion in the hands of the judiciary with regards to the interpretation of questions which may be political in nature. In this regard, Anderson notes that making moral judgements is unavoidable, 'even where a precise and comprehensive textual definition of a right may be agreed upon'.[105] He observes that 'the enforcing body, whether a judge at the domestic level or a supervisory committee at the international level, will necessarily be

Cultural Rights Research Project, *Australian Capital Territory Economic, Social and Cultural Rights Research Project Report* (2010) 15 <http://regnet.anu.edu.au/sites/default/files/uploads/2015-05/ACTESCR_project_final_report.pdf>.

[101] For various examples, see Environmental Defenders Office (QLD), *Court Cases* <http://www.edoqld.org.au/court-cases/>.

[102] Ibid.

[103] Michael Anderson, 'Human Rights Approaches to Environmental Protection: An Overview' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press, 1998) 1, 23.

[104] Eurick, above n 98, 188.

[105] Anderson, above n 66, 11.

involved in evaluating competing moral claims.'[106] Although it can not be denied that increasing the scope for judicial interpretation in relation to the types of issues raised by the right may involve making 'moral choices', as Anderson later acknowledges, 'such adjustments are made between rights and public order, morality, and health on a regular basis.'[107] Whether or not this is conceived to be an inappropriate expansion of the court's role in this regard is ultimately a question for each jurisdiction and the nature of its particular legal/political system. However, increasing avenues to bring legal actions in the interests of environmental protection can be perceived as a benefit for environmental protection in Australia, given that one of the identified challenges for environmental protection is the lack of compliance with, and enforcement of, various environmental protection laws.

5.7.7 Inform environmental quality standards

As noted above, the HRTHE may create a minimum standard of environmental quality. Accordingly, it is possible that legal recognition of the right may inform environmental quality standards, such as air quality and water quality standards. As identified in Chapter Two, despite the operation of a complex system of laws and policies designed to regulate human impacts on environmental health, there are continuing issues with environmental quality standards in Australia. Accordingly, if domestic legal recognition of the right is capable of assisting in addressing this issue, it may be perceived as offering a benefit for environmental protection in this context.

[106] Ibid.
[107] Ibid 16.

5.8 Potential limitations of domestic legal recognition of the right as a tool for environmental protection in Australia

Various criticisms of the utility of the HRTHE as a tool for environmental protection have been put forward. Some critics argue that debating and implementing legal recognition of the right is a redundant and distracting exercise. For instance, Handl argues that 'while it should be self-evident that there is a direct functional relationship between protection of the environment and the promotion of human rights, it is much less obvious that environmental protection ought to be conceptualized in terms of a generic human right'.[108] The utility of the right for environmental protection has been called into question on various grounds. Some commentators argue that the right is destined for failure due to its inability to address the fundamental structural causes of the global ecological crisis. To this end, Weston and Bollier argue that it is an 'inconvenient truth' that as the HRTHE must operate within an 'essentially unregulated' capitalist system, it is unlikely to be 'widely recognized and honoured across the globe in any formal/official sense'.[109] Whilst there are some strengths to criticisms made on this basis, they embody an unrealistic expectation as to the right's purpose and operation. Fundamentally, they expect too much of the right. Advocates do not maintain that the right would (or should) be capable of providing some form of panacea for all of the structural, social, economic, political and legal challenges facing the achievement of ecologically sustainable development. Rather, they contend that the right offers certain benefits for environmental protection, within the confines of the existing system.

Other critics question the appropriateness of an approach to environmental protection which is so explicitly anthropocentric. Catherine Redgwell explains that there are 'two distinctive strands to such criticisms, broadly identified as deep ecology or environmentalism, and animal rights.'[110] She concludes that although the response to these criticisms is largely dependent 'on the substance of the right and the interpretive scope given to the 'environment'', recognition of the right does not have as 'its necessary corollary the denial

[108] Günther Handl, 'Human Rights and Protection of the Environment: A Mildly "Revisionist" View' in Antonio Augusto Cancado Trindade (ed), *Human Rights, Sustainable Development and the Environment* (Instituto Interamericano de Derechos Humanos and Banco Interamericano de Desarrollo, 1992) 117, 119.
[109] Burns H Weston and David Bollier, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons* (Cambridge University Press, 2013), 49.
[110] Redgwell, above n 75, 71.

of non-human rights'.[111] In other words, human, animal and nature rights are capable of co-existence. However, as Anderson notes, the 'tensions' between and within the human rights and environmental protection movements 'cannot be wished away, despite the fashionable view that human rights and environmental protection are interdependent, complementary, and indivisible.'[112] He argues that the 'interdependence argument…sometimes serves as a moral comforter which temporarily cloaks the extremely difficult questions which must be faced'.[113] Without 'wishing away' these tensions, he notes that it is possible to overcome the 'most extreme forms of anthropocentrism' by drafting environmental rights 'so as to acknowledge and respect non-human entities'.[114] As noted by Boyle, environmental human rights 'include protection and preservation of flora and fauna, essential processes and areas necessary to maintain biological diversity and ecosystems, as well as conservation and sustainable use of nature and natural resources.'[115]

Accordingly, whilst the right is explicitly anthropocentric, it is capable of accommodating the interests of non-human entities. For this reason, its anthropocentric nature should not be considered persuasive grounds for rejection of the right. Indeed, many of the right's benefits in fact flow from its ability to characterise environmental concerns as human concerns. However, this highlights a further criticism of the right, which relates to the potential dangers associated with the adoption of human rights rhetoric. Harding argues that 'the language of human rights may politicize and draw attention to environmental claims in a way that may attract more overt opposition from polluters, or even exacerbate government repression'.[116] Although this is certainly a risk, most environmental issues are already heavily politicised, irrespective of whether those issues are expressed in the language of human rights.

Finally, it must be acknowledged that the perceived utility of the right as a tool for environmental protection is to an extent, a matter of perspective. Whether the consequences of domestic legal recognition are perceived as benefits for environmental protection, implicitly involves assumptions about the goals of environmental protection and how they are best achieved. Even if agreement can be achieved on the goals of environmental

[111] Ibid 87.
[112] Anderson, above n 66, 3.
[113] Ibid.
[114] Ibid 15.
[115] Boyle, above n 74, 52.
[116] Harding cited in Anderson, above n 66, 23.

protection, opinion may differ on the identification of the key challenges facing environmental protection, the causes of those challenges and the best way to address them. Some may conceive of the goals of environmental protection as essentially being synonymous with the goals of ecologically sustainable development (ESD). Meanwhile, others may conceive of the primary goal as being the achievement of rights for all living beings, or the goal of returning the environment to a state of environmental health as near as possible to pre-human impact. Similar debate exists over the key causes of environmental problems, with some attributing blame to the broader capitalist system itself, whilst others support the system but cite a lack of compliance and enforcement of existing laws and policies as the key issue facing the achievement of environmental protection. Further disagreement focusses on the adequacy of available solutions to these issues. For example, the utility and desirability of market-based mechanisms, compared with calls for increased state regulation.

If it is agreed that achieving ESD is the goal of environmental protection, and that the main challenges are related to a lack of government action, it may be possible to conclude that the HRTHE with its potential ability to inspire increased government action on environmental problems is an ideal solution or tool for environmental protection. However, as discussed earlier in Chapter Three, some commentators argue that environmental protection should aim to recognise the rights of nature, over and above the rights of human beings where necessary. According to that conception of the human-environment relationship, the HRTHE may not be an appropriate tool, as it may not further the identified goals of environmental protection, or provide a means of addressing the challenges for environmental protection identified under that approach. In fact, granting humans a right to a healthy environment could be at odds with more ecocentric rights-based conceptions of environmental protection.

There is a significant divergence of opinion on important questions regarding the best means to achieve improved environmental protection. For instance, debate over who has authority to decide what is in the best interests of environmental protection, and whether the Commonwealth government should play a greater role in environmental protection. The importance and role of non-state actors is also a significant area of contention. It could be argued that ensuring access to an adequately funded public interest environmental law

community legal centre network is critical for ensuring adequate compliance and enforcement with Australia's environmental laws. This issue came to a head recently in response to the Federal Government's decision to remove federal funding for the national network of Environmental Defenders Offices.[117] The decision to remove funding was an inherently political decision, which was part of a broader reform agenda involving devolution of environmental regulation from the Commonwealth to the states, and the reduction of 'green tape'.[118] According to the Greens political party, these law and policy changes represent a backwards step for environmental protection.[119] However, others believe that an adequate level of environmental protection can be achieved with less expenditure of funds, less involvement of independent third parties and less regulatory oversight.

Essentially therefore, to claim that recognition of the HRTHE could be used as an effective tool for environmental protection, is to claim that the right may have certain consequences for the environmental protection landscape in Australia which constitute a 'benefit' according to a particular perspective on what constitutes the best approach to environmental protection. For these reasons, it is critical to appreciate that domestic legal recognition of the right may offer one possible means of addressing some of the various challenges facing the pursuit of environmental protection at present in Australia. It is most certainly not a panacea for all of the problems facing environmental protection.[120]

Australia's environmental problems are vast, varied, and according to observed trends, relatively persistent. As noted by Professor Ian Lowe, over the past two decades 'many of Australia's biggest environmental problems have remained the same'.[121] He attributes this to the fact that certain 'persistent problems' have been allowed to continue, largely

[117] Christine Trenorden, 'Environmental Legal Aid Slashed When Australia Needs it Most' (2014) *The Conversation* <https://theconversation.com/environmental-legal-aid-slashed-when-australia-needs-it-most-23988>.
[118] Liberal Party of Australia, *The Coalition's Policy to Boost Productivity* (2013) <http://lpaweb-static.s3.amazonaws.com/Policies/ProdPolicy10Jul13.pdf>.
[119] For example, see the comments made by Greens Senator Larissa Waters in response to the reforms: Larissa Waters, 'Environment to Become 'One Stop Shop' for Big Business' (2011) <http://larissa-waters.greensmps.org.au/content/media-releases/environment-become-%E2%80%98one-stop-shop%E2%80%99-big-business>.
[120] Boyd, above n 76, 252.
[121] Ian Lowe, 'The State of Australia: Our Environment' (2014) *The Conversation* <https://theconversation.com/the-state-of-australia-our-environment-26035>.

unchecked.[122] Included within this list, are the problems posed by degraded agricultural land, native wildlife decline, climate change, and insufficient environmental health monitoring in various areas.[123] It would be clearly unreasonable to expect that one regulatory approach, or one regulatory tool could provide the solution to these varied, persistent and interrelated problems. Accordingly, subsequent chapters will only seek to explore the extent to which different forms of domestic legal recognition of the HRTHE may be capable of realising the identified potential benefits for environmental protection in Australia.

[122] Ibid.
[123] Ibid.

5.9 Conclusion

What are some potential benefits for environmental protection in Australia associated with international legal recognition of the human right to a healthy environment? How could the human right to a healthy environment be recognised under Australia's domestic laws? What potential benefits for environmental protection may be associated with domestic legal recognition of the right? What are the possible limitations of both forms of recognition?

The aim of this chapter was to ascertain whether there are any potential benefits for environmental protection in Australia associated with international and domestic legal recognition of the HRTHE. Firstly, the options for international legal recognition of the right were considered. It was explained that although there have been proposals to recognise the HRTHE within a binding global treaty, it is unlikely that this form of international legal recognition will be adopted in the near future. Accordingly, it was concluded that it is more likely that the right would be recognised as an implied right under the ICESCR. For this reason, the chapter was limited to an exploration of the potential benefits for environmental protection in Australia associated with this form of legal recognition.

It was argued that there are three main potential benefits associated with recognition of the HRTHE as an ICESCR right which can be identified. Namely, increased scrutiny (especially at the international level) of Australia's environmental and natural resources management systems, the opportunity to learn from a global jurisprudence on the implementation of the right, and the ability to compare Australia's environmental performance to other countries. The possible realisation of these benefits in the case study context of Australian water resources management was then discussed. It was argued that all of the identified benefits could be realised to some extent. However, three main limitations of international recognition of the right for environmental protection in Australia were identified. Firstly, it was identified that the obligations imposed by the HRTHE may be largely duplicative of Australia's existing international environmental law obligations. It was demonstrated in the case study context of water management, the obligations imposed by the HRTHE could duplicate to a large extent existing obligations under international customary law. However, it was argued that this limitation does not render recognition of the right redundant, as arguably recognition of these obligations as components of a broader human rights obligation to protect, respect and fulfil the right as an ICESCR right may prove more effective than the imposition of customary international law obligations. As noted earlier in Chapter Three, the HRTHE benefits from the existing monitoring and compliance

mechanisms established for human rights more generally. Moreover, it was argued that not only might the content of the HRTHE differ in significant ways from these existing obligations, but that where there is overlap, the imposition of HRTHE obligations could help to strengthen and operationalise these obligations. Accordingly, they could have a complementary operation, rather than rendering the obligations imposed by the HRTHE redundant.

It was argued that a second area of limitation concerns the fact that a number of the benefits associated with international legal recognition of the right are already being realised to an extent. For instance, Australia is already able to learn from the comparative environmental governance experiences of other countries. It is also already subject to comparisons against international standards in terms of evaluating environmental protection performance. However, it was argued that there are distinct additional benefits which may be associated with facilitating international peer learning, and increased international scrutiny via the mechanism of the HRTHE. For instance, it was argued that recognition of the right at the international level may lead to the elucidation of international benchmarks for achieving realisation of the right at the domestic level, which could help to reveal areas where Australia was falling short of international standards. Accordingly, there could be benefits associated with the implementation of human rights indicators for the HRTHE which are not associated with indicators designed to measure Australia's progress towards sustainable development goals.

A third area of limitation relates to the Australian Government's record regarding the fulfilment of international human rights obligations which have not been recognised under domestic legislation. However, it was argued that even non-compliance with the obligations imposed by the right could have beneficial impacts for environmental protection as it would highlight areas for improvement which could increase international pressure and scrutiny on Australia to improve its realisation of the right.

The chapter then turned to consideration of the potential benefits for environmental protection in Australia associated with domestic legal recognition of the right. Firstly, the options for domestic legal recognition of the right in Australia were outlined, followed by a consideration of the possible expression of the right at the domestic level. It was concluded

that the optimal expression is characterisation of the right as a 'right to a healthy environment' as that form of expression best captures the identified possible content of the right at the international level. The potential benefits for environmental protection associated with domestic legal recognition in Australia were then considered. It was explained that as it is not possible for the thesis to consider all of the potential benefits, the thesis is restricted to consideration of whether recognition is capable of realising a set of potential benefits which have been realised through domestic recognition of the right in other jurisdictions. It was concluded that if these potential benefits are able to be realised through domestic legal recognition of the right in Australia, it may be able to help address some of the key challenges facing the realisation of ESD.

These benefits include the provision of a stronger basis for environmental laws and policies, increased prioritisation of environmental protection considerations in government decision-making, and the creation of expanded avenues to bring legal actions in the interests of environmental protection. It was acknowledged that whilst there are various valid criticisms of rights-based approaches as a tool for environmental protection, the potential benefits identified warrant consideration of recognition of the right in Australia. It was argued that various criticisms expect too much of the right, and that it would be unreasonable to expect one legal mechanism to address the vast and varied problems facing environmental protection in Australia. Accordingly, the subsequent two chapters consider the options for domestic legal recognition of the right in Australia, and explore whether the potential benefits for environmental protection identified may be realised through forms of constitutional or legislative recognition of the right.

Chapter Six
Constitutional Recognition of the Human Right to a Healthy Environment in Australia

Is it possible to recognise the human right to a healthy environment under the Australian Constitution? If so, what is the most preferable form of recognition? Can the potential benefits for environmental protection identified for domestic legal recognition be realised through the preferable form of constitutional recognition? How could these benefits be realised in the Australian water management context? What are the potential limitations?

6.1 Introduction

The *Australian Constitution* was created 115 years ago, in a vastly different social, political and economic context. Women were unable to vote, aboriginal peoples were excluded from the national census, and modern international human rights law had yet to come into existence. It was born out of a spirit of federalism, motivated primarily by economic considerations and a desire to improve conditions for trade between the colonies.[1] Although the drafters were certainly able to refer to the US model which contained a bill of rights, the 'founding fathers' generally chose to omit express recognition of individual rights in the *Australian Constitution*. It was presumed that the few express rights recognised in the *Constitution*, our system of representative democracy and the common law, would provide sufficient protection for fundamental rights held by the people of Australia.[2]

Over time, the accuracy of this presumption has been called into question. The High Court of Australia, which is charged with the interpretation of the *Constitution*, has 'implied' certain rights and freedoms into the *Constitution* in order to facilitate the achievement of express provisions. Moreover, the incredible growth of human rights law at the international level post World War Two, and the consequent domestic implementation of Australia's human rights obligations through national legislation demonstrates that crucial gaps in Australia's rights protection existed, and continue to exist.

[1] Department of the Prime Minister and Cabinet (Cth), *Reform of the Federation: White Paper* (2014) 16 <https://federation.dpmc.gov.au/sites/default/files/issues-paper/issues_paper1_a_federation_for_our_future.rtf>.
[2] George Williams, 'Critique and Comment: The Victorian *Charter of Human Rights and Responsibilities*: Origins and Scope' (2006) 30 *Melbourne University Law Review* 880, 881.

Whether statutory or constitutional recognition of a bill of rights is the appropriate method of addressing any perceived failure to adequately provide legal recognition for fundamental human rights, is a question of considerable debate. It is however certain that the absence of a bill of rights raises significant issues in regards to the identification and implementation of emerging human rights, such as the proposed human right to a healthy environment. Accordingly, the purpose of this chapter is to consider broadly the various options for constitutional recognition of the right in the Australian context. It argues that a constitutionally recognised HRTHE could offer various potential benefits for environmental protection in Australia. The potential realisation of these identified benefits in the case study context of water resources management is considered, concluding that all of the identified benefits may be realised to some extent.

The chapter argues that although Australia would potentially benefit from certain forms of constitutional recognition of the right, it is highly unlikely to receive recognition due to the challenges posed by the amendment procedure, traditional reluctance to recognise express constitutional rights, and the history of resistance towards the inclusion of new provisions generally. Accordingly, the subsequent chapter explores options for legislative recognition at the federal and state/territory levels.

6.2 Constitutional recognition of the human right to a healthy environment

Although one hundred and fifty countries around the world provide constitutional recognition of the human right to a healthy environment,[3] Australia has failed to provide any form of legal recognition of the right. Whilst this omission may seem surprising, it can be explained through examination of Australia's broader constitutional context. The *Australian Constitution* was never intended to act as a comprehensive statement of the respective roles and duties of each arm and level of government, and the individual rights of Australian citizens. As noted by Chief Justice Gleeson in *Roach v Electoral Commissioner* (2007) 233 CLR 162:

> The *Australian Constitution* was not the product of a legal and political culture, or of historical circumstances, that created expectations of extensive limitations upon legislative power for the purpose of protecting the rights of individuals. It was not the outcome of a revolution, or a struggle against oppression. It was designed to give effect to an agreement for a federal union, under the Crown, of the peoples of formerly self-governing British colonies.[4]

Although the framers of the *Australian Constitution* were able to look to the *Constitution of the United States of America* as a model, they deliberately chose not to emulate the American style of express constitutional rights. This was motivated partly by concern that 'judicial interpretation of abstract rights could have unpredictable and undesirable consequences'.[5] Very few express rights exist in the text of the *Constitution*, and for various reasons, Australians continue to 'remain wary of constitutionally entrenched rights'.[6]

In addition to this reticence to recognise constitutional rights, the framers provided very minimal express reference to the natural environment. Unlike the majority of the world's nations,[7] the *Australian Constitution* does not contain any declaration as to the importance of the environment or the values which should govern environmental protection. Despite the critical importance of environmental management in a land characterised by climactic instability, responsibility for environmental protection and regulation is not directly

[3] David R Boyd, 'Constitutions, Human Rights, and the Environment: National Approaches' in Anna Grear and Louis J Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar, 2015), 170, 172.
[4] *Roach v Electoral Commissioner* (2007) 233 CLR 162, 172 [1] (Gleeson CJ).
[5] Jeffrey Goldsworthy, 'Introduction' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate Publishing, 2006) 2, 2.
[6] Ibid 3.
[7] See generally, Christopher Jeffords, 'Constitutional Environmental Human Rights: A Descriptive Analysis of 142 National Constitutions' in Lanse Minkler (ed), *The State of Economic and Social Human Rights: A Global Overview* (Cambridge University Press, 2013) 329.

addressed under the *Constitution*. The failure to address this issue was partially due to the presumption that such matters would generally remain within the ambit of state/territory jurisdiction. It can also be attributed to the socio-historical context of the document's creation. At the turn of the century, environmental protection was not the mainstream governance issue that it is today.

In the absence of express recognition of the right, it may be possible to found a basis for implication from the text and structure of the *Constitution*. However, for various reasons it is extremely unlikely that the High Court would recognise an implied constitutional right to a healthy environment. In particular, the general reluctance of the Court to engage in this interpretive exercise, and the fact that there are arguably no grounds which could act as the basis for such an implication. Unlike the *Constitution of India*, where the Supreme Court has been able to derive environmental rights through interpretation of the broader 'right to life',[8] the *Australian Constitution* does not contain any analogous express rights. Implied freedoms under the *Australian Constitution* are best characterised as 'implied freedoms from governmental power'.[9]

The human right to a healthy environment can be conceptualised as both a negative and positive right (a 'freedom from' and a 'right to'). Its positive elements necessarily involve a demand on government resources,[10] and the High Court has not indicated any intention to recognise implied rights of this nature. As noted by Williams and Hume, 'the Constitution protects freedoms from, rather than freedoms to'.[11] The currently recognised implied freedom of political communication can be justified as a necessary implication from the text of the *Constitution* (primarily ss 7 and 24). It is difficult to see how a human right to a healthy environment could be similarly implied from the text of the document. The High Court has

[8] See *Mehta v Union of India et al*, 1988 A.I.R. 1115; *Bandhua Mukti Morcha v Union of India*, 3 S.C.C. 161 (1984); *Subhash Kumar v State of Bihar* A.I.R. 1991 SC 420. For a discussion of these cases in the broader context of other jurisdictions where courts have utilised the right to life as a basis for implication of environmental rights, see: Donald K Anton and Dinah L Shelton, *Environmental Protection and Human Rights* (Cambridge University Press 2011) 460-463.
[9] Patrick Keyzer, *Constitutional Law* (2nd ed, LexisNexis Butterworths 2005) 303.
[10] Williams and Hume note that even the recognition of negative rights can involve government expenditure. They cite the example of the constitutional requirement that states maintain a court system, which 'clearly has fiscal consequences': George Williams and David Hume, *Human Rights under the Australian Constitution* (2nd ed, Oxford University Press 2013) 154.
[11] ibid 153.

not recognised any implied economic, social and cultural rights, and it is unlikely that it could or would do so in the future.

From the foregoing discussion, it can be concluded that the *Australian Constitution* does not expressly or impliedly recognise the HRTHE. Accordingly, it is necessary to consider the options for express constitutional recognition of the right, and express constitutional recognition of the rights from which the HRTHE may be implied.

6.3 Options for express constitutional recognition

It is possible to provide express recognition of the HRTHE under the *Australian Constitution*. However, any addition or alteration to the text of the *Constitution* must be via the amendment procedure outlined under s 128. The amendment procedure established under s 128 is notoriously difficult to satisfy, with only eight out of forty four proposed changes meeting the requirements and resulting in amendments to the *Constitution*.[12] As a result, the *Constitution* has only undergone a few alterations since its creation, despite the passage of over a century of important social, economic, political and cultural developments. Accordingly, achieving any form of express inclusion of the right will face a significant obstacle in s 128.

A further issue relates to the location and nature of its inclusion in the text of the document, which may have implications for its operation and effect. In particular, it may dictate whether the right would operate as a limit and/or source of Commonwealth power. As explained earlier in Chapter Five, various forms of Commonwealth constitutional recognition are available, including incorporation in the Preamble of the document, within Chapter One, within a new section dedicated to the topic matter of the 'environment', or within the broader context of a constitutional bill of rights.[13] All of these potential options will be explored in the following section, as well as options for recognition of the right in state constitutions and territory self-governing legislation.

6.3.1 Option One: Recognition of the right within a constitutionally entrenched Bill of Rights

There are two main options for recognition of the right in a broader constitutional bill of rights; recognition of an independent right to a healthy environment, or recognition of rights from which the right to a healthy environment may be implied. Recognition of an independent right would arguably be more difficult to achieve than recognition of more

[12] As noted by the Parliamentary Education Office, '[s]ince 1906, when the first referendum was held, Australia has held 19 referendums in which 44 separate questions to change the Australian Constitution have been put to the people. Only eight changes have been agreed to': Parliamentary Education Office, *How the Constitution Can Be Changed* (2014) <http://www.peo.gov.au/learning/closer-look/the-australian-constitution/how-the-constitution-can-be-changed.html >.

[13] It is interesting to compare these constitutional recognition options with the options explored by Boyd in the Canadian context: David R Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (UBC Press, 2012), ch 8.

traditional social and economic rights (such as the right to life). However, if the right is not recognised expressly in a bill of rights, the right's existence will be dependent upon implication via constitutional interpretation. This is a more volatile basis for the right, and also leaves the expression of the right at the mercy of judicial interpretation. Pursuing either option depends upon successfully entrenching a bill of rights into the *Constitution*, which for reasons canvassed below, is unlikely to occur any time in the near future.

The introduction of a federal constitutional bill of rights into the Australian constitutional landscape has captured the minds of constitutional academics, political scientists and politicians for over a century. [14] Despite this ongoing debate, there has never been a successful attempt to constitutionalise a comprehensive bill of rights under the *Commonwealth Constitution*.[15] Proposals for the recognition of certain rights have been put forward and debated and in some cases voted upon at referendums. However, since federation, no new express rights have been introduced into the *Australian Constitution*.[16] Although most constitutional commentators, in light of this history, consider the prospect of a constitutionally entrenched bill of rights to be highly unlikely, it is nonetheless important to consider its merits.

However, before embarking on this journey, it is useful to heed the words of Webber:

> The debate over bills of rights often falls into simplifications in which rights are starkly pitted against majorities. Abstract and highly symbolic arguments dominate the field. And too often the participants are either wide-eyed believers in a conception of rights so pristine that disagreement and institutional concerns have no place, or fierce prophets of the impending death of democracy. [17]

As intimated in the above quote, debate in this field is divided along various lines. Whilst some commentators may support the idea of a constitutionally entrenched bill of rights in theory, out of pragmatism they accept a legislative bill of rights as an adequate substitute.[18]

---

[14] As noted by Byrnes, Charlesworth and McKinnon, '[a] debate over whether Australia should have some kind of bill of rights has proceeded in fits and starts since Federation': Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bill of Rights in Australia: History, Politics and Law* (UNSW Press Ltd, 2009) 23.

[15] For a summary of Australia's 'history of rejection' in regards to bills of rights proposals, see generally Paul Kildea, 'The Bill of Rights Debate in Australian Political Culture' (2003) 9 (1) *Australian Journal of Human Rights* 7.

[16] However, in 1977 the existing right to vote in referendums under s 128 was extended to residents of the territories.

[17] Jeremy Webber, 'A Modest (but Robust) Defence of Statutory Bills of Rights' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate Publishing, 2006) 263, 283.

[18] For example, see the comments by former Australian Human Rights Commissioner, Sev Ozdowski: Sev Ozdowski, 'Human Rights – A Challenge for Australia' (Speech delivered at National Press Club, Sydney, 6

Others do not support constitutional entrenchment under any circumstances, but will support certain forms of legislative recognition.[19] Some remain sceptical of any form of formal comprehensive legal recognition of human rights at the federal level, and instead advocate for reliance on increased parliamentary scrutiny, human rights institutions and the common law.[20] At the heart of most of this debate is the issue of democracy, and the implications of rights recognition for the respective roles of each arm of government. Explaining the crux of the contention, Galligan and Morton argue that 'the primary effect of adopting a bill of rights is institutional, shifting primary responsibility for making decisions about rights claims from legislatures to courts.'[21] It is the role of the judiciary with respect to a constitutional bill of rights, which incites the most academic conflict. According to critics, such as Brandis, it is politicians operating 'in the open forum of elected and accountable Parliaments' who should be engaging in human rights determinations, rather than the 'unelected and largely anonymous judges in the cloistered environs of the courts.'[22]

Such concerns over the creation of a class of 'judicial legislators' have been raised as theoretical objections to bills of rights for decades. As noted by Darrow and Alston, a 'closely related critique is that the entrenchment of bills of rights leads to the judicialization of politics.'[23] These theoretical concerns must be tempered by consideration of the significant overseas experience with legal implementation of bills of rights (both constitutionally entrenched, and statutory):

> The New Zealand model provides strong evidence that a Bill of Rights can be effective without transferring ultimate power from the legislature to the judiciary. Even in Canada, where the Supreme Court is empowered to strike down legislation for inconsistency with the Charter of Rights and Freedoms, judges have generally been cautious in developing a rights jurisprudence.[24]

February 2002) <http://www.humanrights.gov.au/news/speeches/human-rights-challenge-australia-dr-sev-ozdowski-2002>.

[19] For example, Gibbs argues against a constitutionally entrenched bill of rights, arguing that 'it is much more satisfactory to define rights clearly and precisely by detailed legislation rather than to guarantee so-called fundamental rights which are expressed in general terms': Harry Gibbs, 'Does Australia Need a Bill of Rights?' (Paper presented at the Sixth Conference of The Samuel Griffith Society, Carlton, 17-19 November 1995) <http://www.samuelgriffith.org.au/papers/html/volume6/v6chap7.htm>.

[20] For example, see generally: George Brandis, 'The Debate We Didn't Have to Have: The Proposal for An Australian Bill of Rights' (2008) 15 *James Cook University Law Review* 24.

[21] Brian Galligan and F L Morton, 'Australian Exceptionalism: Rights Protection Without a Bill of Rights' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance in Australia* (Ashgate Publishing, 2006) 17, 17.

[22] Brandis, above n 20, 27.

[23] Mac Darrow and Philip Alston, 'Bill of Rights in Comparative Perspective' in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford University Press, 1999) 465, 513.

[24] George Williams, *A Bill of Rights for Australia* (University of New South Wales Press, 2000), 48.

Whilst it is indeed inevitable that the introduction of a bill of rights would result in a modified role for the judiciary, it is important to be clear on the current role of Australian judges, with respect to the making of policy/value judgements. As noted by a former Chief Justice of the High Court, '…it would be a mistake to think that judges are wholly unfamiliar with considerations of policy and are not affected - albeit to a strictly limited extent - by political, social or ethical values in the decisions which they render under the existing constitutional regime.' [25] Acknowledging that policy/value judgements are already made by the judiciary at present, however, does not fully address the arguments of critics. Under a bill of rights, the role of judges with respect to human rights may be significantly altered. This may have impacts not only for the role of the judiciary, but also upon the human rights discourse. For instance, Tom Campbell argues that inviting judges to consider the compatibility of legislation with human rights may 'unhelpfully legalise the discourse of human rights'.[26] He warns that in doing so it may have the effect of '…masking the fact that there are significant moral disagreements about what the content of human rights law ought to be, disagreements that are politically more fundamental than the question of whether an Act is or is not compatible with existing human rights law.' [27]

In making a determination as to the compatibility of legislation with a bill of rights, judges must cast judgement on the scope, content and priority of relevant rights. As noted by various commentators in the field, in many instances these are inescapably political questions. For some critics, the judiciary is not the appropriate institution for this task as unlike Parliament, the judiciary is made up of unelected and often relatively unrepresentative individuals.[28] Moreover, the nature of the judicial method can be viewed as a problematic means of resolving rights conflicts. Critics have expressed concern that inviting judges to resolve these rights conflicts 'changes the discourse from an argument about how best to allocate resources to serve the interests of society as a whole, to an argument about the (asserted) rights of a particular individual.'[29] Brandis argues that it 'changes an argument about social benefit to an argument about individual claims', and in doing so 'it decontextualises what

[25] Gerard Brennan, 'The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Perspective' in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford University Press, 1999) 454, 463.
[26] Tom Campbell, 'Does Anyone Win under a Bill of Rights?: A Response to Hilary Charlesworth's 'Who Wins under a Bill of Rights?" (2006) 25(1) *The University of Queensland Law Journal* 55, 59.
[27] Ibid.
[28] Jenny Morgan, 'A Constitutional Right to (Gender) Equality: What's the Difference?' in Glenn Patmore and Gary Jungwirth (eds), *The Big Makeover: A New Australian Constitution* (Pluto Press, 2002) 166, 167.
[29] Brandis, above n 20, 37.

should be a decision about public policy, in which the claims of all stakeholders are weighed against each other and placed in the context of overall social benefit, and replaces it with a litigious process in which all such considerations must yield to a claim of right, once established, and in which there are no - or very limited - opportunities for the voices of other interests to be heard.'[30] Arguably, these issues are of less relevance in the context of a constitutionally recognised HRTHE, given that the right is implicitly directed towards consideration of overall social benefit, as it seeks to maintain a standard of environmental health that will benefit all members of society.

Further concerns relate to the potential for judges to utilise broad rights declarations to pursue their own agendas ('judicial activism'), and the risk of undesirable and unintended consequences flowing from judicial interpretation. As a democratic federal nation, with a constitutionally entrenched bill of rights, the United States provides a useful insight into the impact of a constitutional bill of rights on the role of the judiciary. The *United States Constitution* contains ten 'amendments' which collectively form the well-known 'Bills Of Rights', including the rights to freedom of religion and expression. The US Supreme Court has the power to invalidate any legislation which is found to be inconsistent with the rights contained in the *Constitution*, and has exercised this power on countless occasions. However, critics from various political perspectives have criticised the way in which the Supreme Court exercises its power.

Some have accused the Supreme Court of 'judicial activism', whilst others have condemned the Court for its reticence to step in and remedy failures of the political process.[31] Although it is difficult to define 'judicial activism', common to all definitions is the notion that it involves the judiciary acting outside the scope of its appropriate role. For example, it is not considered appropriate for judges to decide cases with a view to achieving 'desired social results'.[32] Rather, they should make decisions according to the rules and principles which have been established to guide their interpretation and application of the law. Judicial

[30] Ibid.
[31] For discussion of the different perspectives, see generally: Geoffrey R Stone, '*Citizens United* and Conservative Judicial Activism' (2012) 2 *University of Illinois Law Review* 485; William P Marshall, 'Conservatives and the Seven Sins of Judicial Activism' (2002) 73 *University of Colorado Law Review* 1217.
[32] French citing Schlesinger in Robert French, 'Judicial Activism – The Boundaries of the Judicial Role' (Paper presented at Lawasia Conference, Ho Chi Minh City, Vietnam, 10 November 2009) 7 <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj10Nov09.pdf>.

activism may manifest in various different forms, including the 'invalidation of the arguably constitutional actions of other branches', a 'failure to adhere to precedent', the creation of 'judicial legislation', 'departures from accepted interpretive methodology' and the use of 'result oriented judging'.[33] Even if these hallmarks of judicial activism are present, it is often the case that significant disagreement is raised by claims of impropriety – both as to whether activism has taken place, and whether it is disagreeable.

As noted by American law Professor Geoffrey Stone, reactions to actual and perceived judicial activism are often dependent on the political perspective of the observer. He observes that '…at some times in our history, judicial activism has been embraced by conservatives and criticized by liberals, and at other times, judicial activism has been embraced by liberals and criticized by conservatives.'[34] Generally, Supreme Court judges attempt to avoid accusations of activism, by maintaining that they are simply declaring the law, and interpreting the intentions of the framers.[35] However, as noted by Stone, this theoretical dedication to discovering and applying the intentions of the founders is problematic in practice as the founders did not necessarily share a unanimous conception of the scope and content of the rights contained in the *Constitution*.[36] And even if they did, the ambiguity of their expression leaves room for judges to 'project onto the Framers their own personal and political preferences.'[37]

He argues that 'the result is an unprincipled and often patently disingenuous jurisprudence'.[38] To support this argument, he examined the outcomes of 'cases in which the conservative Justices tend to be judicially restrained and deferential and those in which they take an activist approach.'[39] He argues that from this analysis 'two obvious patterns' emerge. Firstly, that the 'conservative Justices have generally been very deferential in cases in which minorities…challenge the Constitutionality of government action that disadvantages them'.[40] He argues that these are 'precisely the cases in which activist judicial

[33] Keenan D Kmiec, 'The Origin and Current Meanings of Judicial Activism' (2004) 92 (5) *California Law Review* 1441, 1444. See also the indicia of judicial activism put forward by Marshall, above n 31, 1220.
[34] Geoffrey R Stone, '*Citizens United* and Conservative Judicial Activism' (2012) 2 *University of Illinois Law Review* 485, 499.
[35] Ibid 495.
[36] Ibid.
[37] Ibid.
[38] Ibid.
[39] Ibid 499.
[40] Ibid.

scrutiny is most appropriate'.[41] Secondly, he observes that 'these same Justices have generally been most active in protecting the interests of corporations, commercial advertisers, gun owners, whites challenging affirmative action programs, the Boy Scouts when they claim a First Amendment right to exclude gay scoutmasters, and George W. Bush in the 2000 presidential election'.[42]

He argues that the only way to explain these patterns is 'as the product of personal and ideological preferences':

> [t]hese patterns cannot plausibly be explained by considerations of either judicial restraint or originalism. Moreover, they are patterns that cannot be explained in any principled manner. These results can only be explained as the product of personal and ideological preferences about such matters as guns, corporations, gays, commercial activity, religion, and George W. Bush. This is, to say the least, a worrisome state of affairs because at the same time that conservatives have managed to hoodwink the American people into believing that they are being principled, restrained, and originalist, they are in fact importing their own idiosyncratic values and beliefs into *Constitutional* law in an aggressive and unprincipled manner.[43]

Concluding with a similar finding of conservative judicial activism in the Supreme Court record, Marshall recognises the importance of acknowledging that the meanings of 'conservative' and 'judicial activism' are not 'free from ambiguity',[44] and that 'a non-conservative result…can be the product of a conservative opinion'.[45] He clarifies that 'an activist decision' is not 'necessarily "wrong"' and that a 'decision that exhibits restraint' is not 'necessarily correct'.[46] This distinction is crucial, as it highlights the implicit political judgements which pervade not only the judgments, but also the discussions surrounding claims of judicial activism. According to a case analysis study conducted by a US judge, 'activism' (according to the author's definition) occurs equally between 'liberal' and 'conservative' judges.[47]

From the above discussion, it can be seen that it is possible to interpret the constitutional jurisprudence of the Supreme Court as evidencing a trend towards a degree of judicial activism. Although not all commentators would agree upon this characterisation, the potential for 'creative' judicial interpretation which is created by the recognition of broad

[41] Ibid.
[42] Ibid.
[43] Ibid.
[44] Marshall, above n 31, 1217.
[45] Ibid 1219.
[46] Ibid 1221.
[47] Frank H Easterbrook, 'Do Liberals and Conservatives Differ in Judicial Activism?' (2002) 73 *University of Colorado Law Review* 1401, 1409.

and ill-defined rights is clearly apparent. Whether this would pose a problem in the Australian context is a question of some debate. Even under existing arrangements, the High Court has fallen victim to accusations of judicial activism. A prime example of this alleged judicial creativity can be found in the case of *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo*'), where the High Court famously recognised native title. Although the decision in *Mabo* went some way towards remediating one aspect of the great historical injustice suffered by Australia's aboriginal peoples, not all judicial activism has such positive consequences. In the words of Craven, judicial activism can be 'potentially socially dangerous for precisely the reason that the judges are ill-equipped to discharge any major policy role.'[48]

Accordingly, it is necessary to acknowledge the possibility that entrenching a constitutional bill of rights could invite further and more problematic examples of judicial activism by the High Court. The US model of judicial interpretation in 'rights' cases is quite alien to the Australian judiciary's approach, which is arguably more deferential to the notion of parliamentary sovereignty. For example, in a recent US District Court case concerning the constitutional validity of a ban on same-sex marriage, the trial judge concluded that the state ban violated a number of federal constitutional rights. In doing so, the judge made various comments about the morality of the ban, concluding his judgment with the comment, '[w]e are a better people than what these laws represent, and it is time to discard them into the ash heap of history'.[49] The tenor of the entire judgment indicated that the judge was motivated by certain views as to the morality of same-sex unions, and the ethical implications of their prohibition. This can be contrasted quite significantly with the judicial commentary in the 2013 High Court challenge to the Australian Capital Territory's same-sex marriage legislation.[50] In that case, the High Court considered whether there was an inconsistency between the territory's legislation (which provided for same-sex marriage) and the Commonwealth's *Marriage Act 1961* (Cth), which restricts marriage to a union between a man and a woman.[51] The Court held that the Commonwealth legislation was a

[48] Constitutional lawyer Greg Craven argues that the decisions of *Mabo* and *Wik*, 'reveal clearly enough the incapacity of the courts to enunciate enduring, comprehensive solutions to complex policy problems.' Greg Craven, 'Reflections on Judicial Activism: More in Sorrow than in Anger' (Paper presented at the Upholding the Australian Constitution, Perth, Western Australia, 1997) <http://www.samuelgriffith.org.au/papers/html/volume9/v9chap9.htm>.
[49] *Whitewood v Wolf* 1:13-cv-1861, 39 (MD Penn, 2014).
[50] *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.
[51] *Marriage Act 1961* (Cth) s 5 (1).

'comprehensive and exhaustive statement of the law of marriage', and accordingly the territory legislation operated in the same field and was invalid to the extent of the inconsistency.[52] Unlike the US judges considering the constitutional validity of state same-sex marriage legislation, the judges of the Australian High Court were limited to specific questions of constitutional interpretation, primarily focusing on the meanings of the constitutional terms in question. In the absence of a bill of rights, the human rights implications of overturning same-sex marriage legislation were not the focus of judicial attention.

The case is most significant because of its clarification of the scope of Commonwealth legislative power with respect to marriage. It confirmed that under the *Australian Constitution*, the Commonwealth Parliament has the ability to pass laws with respect to both opposite sex and same-sex marriage, leaving scope for a future Commonwealth Parliament to legislate to legalise same-sex marriage. In other words, the Court clarified the scope of the Commonwealth Parliament's legislative power, but did not pass comment on whether it was appropriate from a human rights perspective to utilise that power to deny the operation of territory same-sex marriage legislation. This is very much in keeping with the Australian system of government, which does not encourage the judiciary to engage in political questions which are believed to be better suited for the elected representatives in parliament to determine. Ironically, had the judges wished to employ 'outcome' based reasoning, motivated by a politically progressive ('liberal') belief in the validity of same-sex marriage, they would have had to employ conservative judicial reasoning to achieve that effect (i.e. they would have had to interpret the marriage power under the *Constitution* as only referring to heterosexual marriage).[53] In holding that 'marriage' for the purposes of the constitutional expression under s 51 included 'same-sex marriage', the Court adopted a more modern and

[52] *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, 442.

[53] However, note the argument by Twomey that the Court adopted an 'intermediate' position between an originalist and contemporary interpretation, by reasoning that as the framers would have considered other forms of marriage (for example, polygamy) as falling within the concept of 'marriage' at the time of the drafting of the *Constitution*, it was not restricted to the traditional understanding of marriage as being an exclusive union between one man and one woman. Accordingly, therefore marriage between two men or two women, could have fallen within that broader understanding of 'marriage'. Although this falls short of constituting a 'contemporary' approach to constitutional interpretation, it was certainly open to the Court to adopt a much more literal interpretation of the term's meaning: Anne Twomey, 'ACT Law Delivers Neither Marriage nor Equality: the High Court's Verdict' (2013) <http://theconversation.com/act-law-delivers-neither-marriage-nor-equality-the-high-courts-verdict-21406>.

expansive view of the meaning of 'marriage', which arguably runs counter to the concept that would have existed in the minds of the *Constitution*'s turn of the century drafters.[54]

The above case comparison demonstrates the potential impact a bill of rights could have upon the role of the judiciary in Australia, and the implications for the scope of Parliament's legislative power. Whether the introduction of a bill of rights would result in inappropriate 'judicial activism' is largely dependent on the adequacy of the safeguards in place to control activism. Safeguards include the requirement to provide reasons, the appeal process, the need to reach a majority verdict, the doctrine of precedent and the ability to dissent. Despite the existence of these safeguards, a 2011 study of High Court cases from the 1990s found that 'attitudinal voting' (where judges are 'substantially influenced by ideology in decision making') was present 'in judicial review cases in the 1990s at the high courts of the United States, Australia, and Canada'.[55] This is a very interesting result considering the different judicial appointment processes, legal systems and rights regimes in each of these federal nations. The common finding of activism supports the comment made by former High Court judge Michael Kirby that,'[a]ctivism to some degree is inherent in the judicial function'.[56]

The fact that judicial activism occurs in the absence of a bill of rights arguably says little about its possible prevalence under a bill of rights. However, it does indicate that the popular fiction that judges in Australia simply 'declare' and do not 'make' law is precisely that – a fiction. This conclusion reduces the weight of arguments against a bill of rights which are largely based upon objection to the politicisation of the judiciary. Judges in Australia are appointed by the executive branch of government, and they bring their own ideologies to the bench which influence the way they interpret and apply the law. Although the Australian judiciary is certainly more independent and less politicised than its counterparts in other countries (such as the US), it would be inaccurate to claim that a bill of rights would invite judges to bring their own personal values, morals and ethics into their decision making, when the reality is that they are already doing so. However, it would certainly require them to openly engage with moral and political questions with an openness, authority and effect that they are currently unable to employ. As noted by Joseph and Castan, '…the vesting of

[54] Ibid.
[55] David L Weiden, 'Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia' (2011) 64 (2) *Political Research Quarterly* 335, 344.
[56] Michael Kirby, 'Judicial Activism: Power Without Responsibility? No, Appropriate Activism Conforming to Duty' (2006) 30 *Melbourne University Law Review* 576, 592.

considerable power in the United States judiciary under the American Bill of Rights has led to the unelected Supreme Court being the ultimate arbiter of inherently political, moral and emotional issues such as the constitutionality (and therefore legality) of abortion, capital punishment and even the resolution of the presidential election in 2000.'[57]

Altering the nature of the judicial role in this manner would be particularly significant as the judiciary would be granted the power to invalidate legislation on the grounds of incompatibility/inconsistency with human rights. Granting judges such power would represent a serious departure from the status quo, one which it is unlikely that the Australian public would support. At present, it is the role of the Commonwealth Parliament to consider the potential compatibility of proposed laws with human rights standards. This is effected through a parliamentary scrutiny committee, tasked with the duty of ascertaining the compatibility of proposed legislation with Australia's human rights obligations.[58] However, even this parliamentary body is limited in its capacity to prevent the passage of laws which violate these rights, as the Parliament retains the power to pass legislation which has been identified as incompatible. In light of this reticence to limit the scope of Commonwealth legislative power on human rights grounds, it is questionable whether an expansion of judicial review under a constitutionally entrenched bill of rights would be politically acceptable.

6.3.2 Option Two: Recognition of the right within the Preamble of the Constitution

The Preamble of the *Commonwealth of Australia Constitution Act 1900* (Imp) is not an inspirational statement of Australia's core beliefs, values and identity. Rather, it is a relatively brief summary of certain fundamental aspects of the purpose and nature of the *Constitution* and the union it sought to effect.[59] McKenna, Simpson and Williams highlight two aspects of the Preamble which limit its potential as an aid for constitutional interpretation or the basis of any implied limits on Commonwealth power. Firstly, they argue that it 'offers rather slim pickings for judges seeking interpretive assistance', as it is a 'bland, largely inconsequential collection of sentiments that could only have a limited and sporadic

[57] Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Thomson Reuters, 3rd ed, 2010) 4.
[58] The Parliamentary Joint Committee on Human Rights was established under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).
[59] John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901).

relevance to the array of *Constitutional* problems currently facing the Court'.[60] Secondly, they note that the Preamble's location 'outside the operative provisions of the *Constitution*…renders it a dubious source of guidance, at least where assistance might be found within the text or structure of the *Constitution* itself'.[61]

Various attempts to increase the relevance and significance of the Preamble have been pursued, including calls for recognition of groups who were marginalised during the drafting of the *Constitution* (such as women and aboriginal Australians). However, modifying the text and/or function of the Preamble would face significant hurdles. Agreement would need to be achieved on several potentially contentious issues including the content, expression, location and operation of the Preamble. McKenna, Simpson and Williams have summarised these challenges. Firstly, they explain that there are challenges associated with achieving agreement on what is/is not included in the Preamble, how it is expressed, and where it is located (at the beginning of the *Constitution* itself, or in the Imperial Act that establishes the *Constitution*).[62] Secondly, they explain that there are challenges associated with achieving agreement on the operation of the Preamble. Namely, whether it will be 'merely symbolic', or whether the provision will be justiciable and therefore of relevance for constitutional interpretation.[63] Finally, they explain that there are challenges regarding establishing the correct legal procedure for amendment.[64] They argue that even if a new preamble was justiciable, it 'could not give rise to substantive rights' which have 'no textual foundation in the *Constitution*':

---

[60] Mark McKenna, Amelia Simpson and George Williams, 'First Words: The Preamble to the Australian Constitution' (2001) 24(2) *University of New South Wales Law Journal* 382, 392.
[61] Ibid.
[62] Ibid 383.
[63] Ibid.
[64] McKenna has outlined the legal issues associated with alteration of the Preamble:'The process of altering the preamble is also complicated by various legal technicalities. There is considerable doubt as to whether Section 128 can be employed to alter the preamble. Indeed, any attempt to do so would go against the orthodox view that Section 128 can only be used to amend the Constitution itself. Aside from relying on the unlikely request and consent of all State governments to Commonwealth amendment of the Constitution Act [under Sub-Section 15(1) of the *Australia Act 1986*] or risking a High Court challenge to the employment of Section 128, the advice tendered to the Republic Advisory Committee by the Acting Solicitor-General in 1993 indicated there was one remaining alternative. This would involve a referendum under Section 128 requesting the people to confer upon the Commonwealth the power to amend the Constitution Act via amendment of the Statute of Westminster. Essentially this would mean that the proposed alterations to the existing preamble would also be included in the referendum question. This method, while risking States' rights objections, still seems the most viable and least complicated means of altering the preamble.' Mark McKenna, 'The Need for a New Preamble to the Australian Constitution and/or a Bill of Rights' (Parliament of Australia, 1996-97) <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9697/97rp12>.

> Even if a new preamble were drafted to include contemporary values and aspirations, and placed at the front of the *Constitution* itself, it could not give rise to substantive rights, having no textual foundation in the *Constitution*…It seems highly unlikely that a justiciable preamble could itself bring about the implication of new rights.[65]

This is not to say however, that a sufficiently worded Preamble could not involve the express recognition of new rights. Falling short of the inclusion of a 'Bill of Rights', it would be possible to recognise certain fundamental rights and values in a new Preamble contained within the *Constitution*. The legal effect of recognising a human right to a healthy environment in a new Preamble would be contingent on various factors, including its specific expression and any other provisions qualifying its application. Given the challenges outlined, and the uncertain legal consequences of recognition, arguably this option is not the most preferable means of recognising the right.

6.3.3 Option Three: Recognition of the right within an existing chapter of the Constitution

Of the eight chapters of the *Commonwealth Constitution*, the most relevant chapter for inclusion of the HRTHE is Chapter One ('The Parliament'). Chapter One of the *Constitution* concerns the structure and powers of the Commonwealth Parliament. At present, there is no direct legislative power granted to the Commonwealth over the subject matter of the 'environment'. However, it is certainly possible to create such a power under s 51 via the s 128 amendment procedure (discussed above). Arguably, in order to enable the Commonwealth to fulfil its obligations under a human right to a healthy environment, the power to pass laws directly with respect to the environment is required. At present, the Parliament relies upon various indirect powers to pass legislation addressing environmental management and protection. Granting the Commonwealth direct power over the environment could have significant implications for the balance of powers between the state/territory and federal governments. As explained in Chapter Two, currently a system of co-operative federalism is in operation, whereby the Commonwealth and the state/territory governments share responsibility over various environmental matters. However, granting the Commonwealth increased legislative power over the environment does not mean that the Commonwealth would necessarily make use of this increased power. Arguably, it already has the potential legislative power to govern most areas of environmental management, but chooses not to realise this potential in favour of a more co-operative approach. In fact, in

[65] McKenna, Simpson and Williams, above n 60, 399.

various areas the Commonwealth has opted to devolve responsibility back to the states/territories (for example, under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) assessment and approval processes).[66]

The case of *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*') provides a prime example of the potential impact of such an expansion of Commonwealth power. The Commonwealth legislation at issue sought to implement international environmental law obligations contained under an international convention, which Australia had ratified. Utilising the external affairs power under the *Constitution* as one of the main sources of legislative power to pass the Act, the Commonwealth argued that the law could be characterised as a law with respect to 'external affairs'. Accordingly, a significant amount of judicial discussion and legal argument was expended on determining whether the Act could be characterised as such a law, and if so, whether the manner of execution was appropriate and adapted to the ends sought to be achieved. Additionally, the judgment explored the arguments in relation to various other heads of legislative power which the Commonwealth was seeking to rely upon. Arguably, it would have been preferable for the court to have expended its thought and analysis on a consideration of whether the law was a law with respect to the subject matter of environmental management and protection, rather than concern itself with legal debates over indirect matters such as, for example, whether the Hydro-Electric Commission fell within the meaning of a 'trading corporation' for the purposes of the 'corporations' power under s 51(xx) of the *Constitution.*

The proposed environment power would need to be qualified by express recognition of the HRTHE in some form. Accordingly, the Commonwealth would have the power to legislate with respect to the environment, in consistency with the human right to a healthy environment. In this sense, the HRTHE could operate as a form of limitation on the scope of Commonwealth legislative power. However, this would not be a comprehensive means of protecting the right, as it would only apply to limit the Parliament's legislative power with respect to the topic matter of the 'environment'. Recognising the right within the context of a constitutionally entrenched bill of rights would apply to the Commonwealth's legislative and executive power more generally, and would therefore more comprehensively protect the

[66] For example, through bilateral agreements: *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 44.

right. Moreover, it is unlikely in light of Australia's environmental regulation history that the Commonwealth would be successful in seeking to gain a general legislative power over the environment.

6.3.4 Option Four: Recognition of the right within a new chapter of the Constitution

At present, the *Constitution* is silent with respect to the principles and values which should govern the management of the Australian environment. It would be possible to insert a new section which outlined these general principles, and included recognition of the HRTHE. Elevating principles and values to the status of constitutional statements could have significant implications for Australian natural resources management and environmental protection legislation. However, introducing a new section on the politically controversial topic of environmental management would be extremely difficult to effect, both in terms of achieving agreement on its necessity, and deciding upon its content.

Historically, amendment proposals have only sought to effect incremental reforms to the text of the document. Introducing an entirely new section would constitute a significant departure from this amendment trend. Moreover, it would seem potentially inconsistent with the focus and nature of the document, which is currently devoted to outlining the structure of government in Australia. It is not focussed on outlining general principles for particular governance areas. Accordingly, creating a section specifically outlining governance principles for the particular area of environmental management and protection may seem incongruous. For the above reasons, creating an entirely new section may be viewed as unnecessary, potentially problematic, and not in keeping with the general approach of the overall document.

6.3.5 Option Five: Recognition of the right within state constitutions and territory self-governing legislation

It may be possible to recognise the HRTHE in the constitutions of the states of Australia, and the self-governing legislation for the Australian Capital Territory ('ACT') and the Northern Territory. At present, none of the state constitutions or the Commonwealth legislation granting self-government to the territories contain a bill of rights. Most amendments to state constitutions can be made via normal legislative amendment

procedures.[67] Accordingly, if sufficient political support could be established in the state parliaments, it would be possible to insert bills of rights into the state constitutions. Similarly, it would be possible to incorporate bills of rights into the self-governing legislation for the territories if sufficient support existed in the Commonwealth Parliament.

If these amendments were made, and a HRTHE was included within the introduced bills of rights, similar consequences would flow for state/territory governments as for the Commonwealth under a Commonwealth constitutionally entrenched bill of rights. Namely, the judiciary would be granted the power to invalidate state/territory legislation and executive decision making in breach of the right, and parliaments would need to make laws in accordance with the right. Recognising the HRTHE at this level could be particularly significant for the realisation of the right, as environmental management and protection is primarily a state/territory responsibility (discussed in Chapter Two). However, given the fact that only one state and one territory have thus far passed limited legislative human rights charters, it would seem that constitutional recognition at the state/territory level is unlikely at present.[68]

[67] John Waugh, 'Australia's State Constitutions, Reform and the Republic' (1996) 3 (1) *Agenda* 59, 61.
[68] These charters are discussed in further detail in Chapter Seven.

6.4 Preferable form of constitutional recognition

In light of the foregoing discussion, it can be concluded that Options Two, Three and Four are the least preferable options for constitutional recognition. Option Two (recognition in the Preamble) faces too many uncertainties and challenges. For instance, uncertainty over whether it could give rise to substantive justiciable rights, and challenges relating to the necessary procedures for effective amendment. Option Three (recognition under s 51) involves the creation of a new Commonwealth legislative power over the topic matter of the environment generally, limited by recognition of the HRTHE. Whilst this could be beneficial for ensuring adequate recognition and protection of the right (by facilitating the passage of Commonwealth environmental protection legislation), it was argued that it would be very unlikely to receive support given the history of Commonwealth/state/territory relations in regards to the division of power in this context. Moreover, it was noted that the right's operation under this recognition option would be limited, as it would only apply to the specific legislative power created.

Option Four involves the creation of a new section devoted to environmental governance. It was argued that it would be incongruous with the existing structure and focus of the document to include a new section specifically directed to one governance area. Moreover, all three of these options do not enable recognition of the right within the broader context of the recognition of other human rights. As Options One and Five enable recognition of the right within the context of the recognition of other civil and political and social, economic and cultural rights, it is submitted that they are the preferable options for legal recognition. Additionally, they are more comprehensive, as they enable the right to apply more broadly. For this reason, the following sections consider the potential benefits for environmental protection associated with constitutional recognition of the human right to a healthy environment as an independent constitutionally entrenched right contained within a broader constitutional bill of rights at both the Commonwealth and state/territory levels.

6.5 Potential benefits for environmental protection associated with constitutional recognition of the human right to a healthy environment

The benefits of constitutional protection of environmental rights is a hotly debated topic.[69] Some commentators view such recognition as merely aspirational, whilst others maintain that it is one of the most powerful legal tools available for achieving superior environmental protection. Boyd belongs to the latter camp, and argues that 'constitutional provisions requiring environmental protection appear to provide a range of benefits, including stronger laws, enhanced public participation, and improved environmental performance'.[70] He notes that over 'the past four decades, there has been a remarkable and ongoing shift toward constitutional recognition of the importance of protecting the environment.'[71] At present, 150 out of 193 of the world's Constitutions 'include explicit references to environmental rights and/or environmental responsibilities...'[72]

The preference and rationale for constitutional recognition of environmental rights has been examined by Hayward. He notes that the 'most general rationale for taking a constitutional approach to environmental protection…is that the seriousness, extensiveness, and complexity of environmental problems are such as to prompt a need for concerted, coordinated political action aimed at protecting all members of populations on an enduring basis.'[73] As a result of his research into the constitutional experience of various jurisdictions, Hayward concludes that 'providing for environmental protection at the constitutional level has a number of potential advantages'. [74] He argues that constitutional recognition 'entrenches a recognition of the importance of environmental protection'.[75] In other words, it raises the value of environmental protection to the status of supreme law, making it more difficult to resile from than a value statement made in an ordinary piece of legislation. He further argues that it 'offers the possibility of unifying principles for legislation and regulation' and 'secures these principles against the vicissitudes of routine politics, while at

[69] For a detailed discussion of the value of environmental constitutionalism, see: James R May and Erin Daly, *Global Environmental Constitutionalism* (Cambridge University Press, 2015).
[70] David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (UBC Press, 2012) 7.
[71] Ibid 47.
[72] David R Boyd, 'Constitutions, Human Rights, and the Environment: National Approaches' in Anna Grear and Louis J Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar, 2015), 170, 172.
[73] Tim Hayward, *Constitutional Environmental Rights* (Oxford University Press, 2005), 5.
[74] Ibid 7.
[75] Ibid.

the same time enhancing possibilities of democratic participation in environmental decision-making processes'.[76] In regards to securing 'these principles against the vicissitudes of routine politics', he argues that constitutional recognition means that environmental protection does not need to 'depend on narrow majorities in legislative bodies'.[77] In his view, 'this is an important consideration', as 'costly' or 'unpopular' approaches to environmental protection may provide 'governments whose eye is on the next election' with an 'incentive to cut back on them'.[78]

Accordingly, a constitutionally protected right may assist in the prevention of 'rollbacks' on environmental protection.[79] Over the past few years, there have been a number of modifications to Australian environmental protection laws, policies, and institutions under the federal coalition government. A number of these reforms could be characterised as rollbacks on environmental protection. At the very least, they highlight that the degree and nature of environmental protection in Australia is a matter of political debate and discretion. Environmental protection is not a right in Australia, even though it may be argued to be a widely held public expectation.

As noted by May, deciding whether to constitutionalise environmental rights 'begs the value of constitutionalism'.[80] It is debatable whether constitutionally recognising rights is the most effective means of ensuring their protection and realisation. Rather than recognising the right under the *Constitution*, it would be possible to recognise the right under ordinary legislation. However, Boyd contends that there are significant and important differences between constitutional and legislative recognition. He argues that whilst ' the difference may not be immediately apparent, constitutional and legislated environmental rights are like Siberian tigers and Siamese cats - related, but with dramatically different degrees of strength.'[81] In his view, by its very nature, a constitutional right 'is likely to have far greater legal, symbolic, and practical importance than a legislated right.'[82] Daly and May concur, arguing that there are distinct benefits associated with constitutionalism which are not associated with other

[76] Ibid.
[77] Ibid 6.
[78] Ibid 7.
[79] Ibid 236.
[80] James R May, 'Constituting Fundamental Environmental Rights Worldwide' (2006) 23 (1) *Pace Environmental Law Review* 113, 116.
[81] David R Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (UBC Press, 2012) 55.
[82] Ibid.

forms of recognition.[83] In particular, they contend that constitutional environmental rights are 'more durable than non-entrenched rights' and they perform a 'normative function that is superior to other domestic legal approaches'.[84]

Boyd's research into the constitutional recognition of the HRTHE in jurisdictions around the world provides support for these arguments. His research has revealed that 'constitutional environmental rights are delivering many of the anticipated benefits and few of the potential drawbacks forecast by legal experts'.[85] He argues that these benefits include '…stronger environmental laws, increased public participation, and ecologically conscious court decisions', as well as the prevention of environmental protection rollbacks by the state and improved implementation and enforcement of existing laws.[86] In particular, he contends that the right has proven to be an effective tool for increasing government accountability and transparency.[87]

Interestingly, Boyd has observed a trend indicating that nations with common law legal systems are less likely to provide constitutional recognition of the right. Although there is no definitive explanation for the trend, he notes that it raises 'several important questions', including:[88]

> Are common-law nations simply emulating the British and American approach to constitutional rights, which is averse to social, economic, and cultural rights as well as the right to a healthy environment? Is the objection based on the issue of justiciability, or do powerful elites in these nations block progress because of fears related to the redistribution of power and resources? Is the common-law legal system an impediment to environmental sustainability? If so, how can this systemic institutional weakness be overcome?'

Arguably, the reluctance to provide constitutional recognition for the right in Australia may not stem from 'systemic institutional weakness', but in fact, quite the opposite. As a strong democracy, with an independent judiciary, a relatively free press, a generally well-educated populace and a reputation free from any significant allegations of government corruption, Australia can lay claim to systemic institutional *strength*. Many of the benefits for

[83] Erin Daly and James R. May, 'Comparative environmental constitutionalism' (2015) 6 *Jindal Global Law Review* 9, 20.
[84] Ibid.
[85] Boyd, above n 70, 249.
[86] Ibid.
[87] Ibid.
[88] Boyd, above n 70, 288.

environmental protection which Boyd cites as a product of constitutional recognition of the right, are considered to be essential elements of a healthily functioning Australian political and legal system. Public participation in government decision-making, adequate law enforcement and institutional mechanisms to ensure government accountability can all be viewed as fundamental elements of a functional first world democracy. For the most part, Australians can expect that many of these benefits for environmental protection will manifest as a by-product of our broader system of responsible and representative government in a democracy based upon the rule of law. However, as recent rollbacks on environmental protection have demonstrated, in the absence of a legal mandate (constitutional or legislative) to protect, respect and fulfil the HRTHE, it is possible for the government to remove and undermine the systems in place to achieve environmental protection.[89] The HRTHE could potentially operate as a legal 'backstop' to prevent rollbacks by the state, and could be utilised as a tool by environmental protection advocates to encourage government action.

If the proposed form of constitutional recognition was adopted, the HRTHE would be recognised as an individual express right within a constitutionally entrenched bill of rights contained within the *Commonwealth Constitution*. Accordingly, the right would have to be taken into consideration by the federal executive, legislature and judiciary in their decision-making processes. The following section considers whether some of the theoretical benefits outlined in Chapter Five may be realised through the form of constitutional recognition proposed. These potential benefits, as identified by Boyd, are drawn from the benefits associated with constitutional recognition of the right in various countries. Boyd's comparative analysis of numerous nations which have provided constitutional recognition of the right in some form reveals that there are a number of benefits associated with constitutional recognition of the right.

In particular, his research found that constitutional recognition of the HRTHE can serve to 'strengthen environmental laws',[90] and prevent 'rollbacks' on environmental protection.[91] In addition to the right's impact on legislation, according to Boyd it has also proven to be

[89] It must be acknowledged that the reforms referred to may not be perceived as rollbacks on environmental protection by some commentators.
[90] Boyd, above n 70, 233.
[91] Ibid 236.

effective in increasing public engagement with environmental governance through litigation. For example, he notes that the right can be utilised by 'public interest litigants to close gaps in environmental law', [92] and litigation utilising the right 'can facilitate increased implementation and enforcement of environmental laws and policies'.[93] In order to scope the analysis, the potential realisation of the identified benefits in the case study context of water resources management will be explored.

6.5.1 Emphasis on the fundamental importance of the interrelationship between human health and wellbeing and the state of the natural environment

It is possible that constitutional recognition could encourage further emphasis on the fundamental importance of the interrelationship between human health and wellbeing and the state of the natural environment. Although this linkage is already recognised to an extent, formal recognition under the *Constitution* could possibly encourage greater emphasis on the interrelationship. A constitutional statement outlining the importance of environmental protection to the Australian public would certainly have a significant impact on the way in which the human/environment relationship is viewed. The possibility of constitutional invalidity could encourage executive and legislative decision-makers to adequately emphasise the linkage in laws, policies and decision-making. At present, there is no constitutional guidance on principles and values to guide the creation of environmental policy and legislation in Australia. Guidance is often drawn from international environmental declarations outlining fundamental principles, such as the principles of sustainable development, which are then implemented at the domestic level in environmental laws and policies.[94] There may be some benefits which could flow from constitutional guidance, in terms of establishing a sustainable development framework at the highest level of Australian law.

In the case study context of water resources management, the link between human health and the health of the natural environment is particularly pronounced, as humans directly consume water and rely upon water to grow food. Accordingly, a constitutional statement recognising the importance of the interrelationship could help to ensure that human rights

[92] Ibid 235.
[93] Ibid 237.
[94] The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) is a prime example.

implications are adequately recognised and addressed in water resources management laws and policies.

6.5.2 Stronger basis for environmental laws and policies

According to Boyd, one of the key advantages of a constitutional HRTHE is its positive influence on the development and application of environmental laws.[95] As demonstrated above, constitutional recognition of the right in Australia could have various consequences for environmental legislation. Firstly, it might help to clarify the respective roles of federal/state/territory governments in environmental protection and management, which would have implications for which level of government regulates environmental protection matters.[96] As noted in Chapter Two, currently responsibility for environmental protection and natural resources management is shared between three levels of government. Although the federal government has adopted significant responsibility over numerous environmental matters, most environment and planning decisions remain within the authority of the states/territories. Accordingly, recognising a human right to a healthy environment at the federal level could potentially result in a significant alteration to the federal balance of power in this area. Providing a constitutional statement outlining the responsibility of the federal government to safeguard the health of the natural environment, could help to justify further federal action on environmental protection.

Although it is a matter of debate whether Commonwealth or state/territory management of the environment is preferable, there is significant support amongst Australian environmental law commentators for an increased role for the Commonwealth in environmental protection. They view federal oversight and direction as a necessary regulatory response to national environmental issues, and highlight the questionable track record of state/territory governments with respect to many key natural resource management issues.[97] Moreover, as

[95] Boyd, above n 70, 233-235.
[96] Boyd has discussed the possible benefits associated with the right's clarification of the role of the federal government in environmental protection in Canada: David R Boyd, *The Importance of Constitutional Recognition of the Right to a Healthy Environment: Executive Summary* (2013) 9-12 <http://davidsuzuki.org/publications/2013/11/DSF%20White%20Paper%201--2013.pdf>.
[97] See for example Rachel Walmsley and Elizabeth McKinnon, 'In Defence of Environmental Laws: ANEDO and COAG's Environmental Reform Agenda' (2012) 3 *National Environmental Law Review* 32, 34. Walmsley and McKinnon argue that '[n]ot only does the Commonwealth generally have higher standards in environmental regulation, but it is better placed (and often better resourced) to manage the environment in the national interest and maintain an arms-length approach to considering projects. This includes where the

noted by Lee Godden, some 'see Commonwealth approval as a necessary check and balance to avoid a conflict of interest - especially where state governments are involved as proponents or are otherwise actively supporting projects'.[98] At the very least, clarification of the respective roles of the various levels of government would be undeniably useful, especially in areas where there has been hesitation over the adoption of responsibility.

This has been a significant area of contention in the context of water resources management in Australia, given increasing Commonwealth involvement over the past few decades. If recognition of the right under a bill of rights was accompanied by recognition of a new head of legislative power on the topic matter of the environment, it could clarify that the Commonwealth has direct legislative power with respect to water resources management. This could have important implications for the strength and authority of Commonwealth water management laws and policies. It could also impact on the scope of Commonwealth water management legislation, as the Commonwealth would no longer be restricted to reliance on other heads of legislative power (such as the external affairs power and the corporations power) to pass legislation governing water resources.

In order to pass the *Water Act 2007* (Cth), the Commonwealth had to rely upon a number of heads of legislative power, and a referral of powers from the Basin states.[99] The source of the Commonwealth's legislative power limits the scope of the legislation, as the legislation has to be capable of being supported by these heads of power. Moreover, the states have the capacity to revoke their referral of powers,[100] creating a vulnerability in the legislation. If a head of legislative power was introduced that enabled the Commonwealth to legislate directly on the subject matter of the environment it would help to strengthen the basis of environmental laws, and potentially also help to increase their regulatory reach by removing the limitations currently imposed by reliance on indirect heads of power.

---

state (or a state-owned corporation) is the development's proponent or otherwise has a financial interest in the development's approval.'

[98] Lee Godden, Jacqueline Peel and Lisa Caripis, 'Commonwealth Should Keep Final Say on Environment' (2012) <http://theconversation.com/commonwealth-should-keep-final-say-on-environment-protection-11047>.

[99] As explained by Stoeckel et al, these powers include the external affairs power, the interstate trade and commerce power, the corporations power, the power to collect information and statistics, and the implied nationhood power: Kate Stoeckel, Romany Webb, Luke Woodward and Amy Hankinson, *Australian Water Law* (Thomson Reuters 2012) 68.

[100] Ibid.

The constitutional limitations imposed on the *Water Act 2007* (Cth) are evident in both the structure and operation of the legislation, and arguably the Act would have been strengthened by reliance on a direct head of legislative power. Although reducing constraints on increased Commonwealth action is not universally viewed as a positive for environmental protection, it would certainly help to facilitate national responses to national environmental problems. Due to the nature of water as a transboundary and vital natural resource, it is crucial that national water management issues receive a national regulatory response. By facilitating the passage of national water management laws and policies, constitutional recognition of the right could therefore be viewed as offering potential benefits for environmental protection in this context.

Recognition of a constitutional right may also help to strengthen environmental laws and policies through the knowledge that the judiciary would be empowered to invalidate legislative and executive action held to be inconsistent with the right. This could strengthen both the development and implementation of environmental laws and policies, as it would create a significant legal consequence for government failure to respect the right.

6.5.3 Increased prioritisation of environmental protection considerations in government decision-making

One of the key challenges facing environmental protection efforts in Australia, is the issue of how to balance sometimes competing economic, social and environmental interests. Elevating an environmental protection mandate to the status of a constitutional right could help to increase prioritisation of environmental protection considerations in government decision-making. Awareness that a relevant decision could be invalidated on the grounds of inconsistency with the right could impact on policy, legislative and executive decision-making processes. As noted by Williams and Burton, 'a government does not want to see legislation it introduces and supports struck down or questioned'.[101] In this regard, constitutional recognition of the right could have a proactive impact, as it may operate to prevent the introduction of incompatible legislation. As noted earlier, the right may operate to effectively limit the scope of Commonwealth legislative power, and a government aware of these limitations may legislate more carefully to ensure consistency with the right. As

[101] George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection' (2013) 34 (1) *Statute Law Review* 58, 92.

consideration of the right may strengthen the relative weight of environmental protection considerations vis a vis other considerations, it is possible that constitutional recognition could therefore assist in increasing prioritisation of these considerations in government decision-making.

In the case study context, as discussed in Chapter Two, one of the key issues facing water management law and policy is the issue of how to balance competing rights and interests in water resources. As discussed in Chapter Five, the right may operate as a 'trump', enabling environmental protection considerations to trump competing considerations where necessary. Having the weight and authority of being able to reference a constitutional right could help to provide government decision-makers in this context with grounds to better prioritise environmental protection considerations. This could for instance impact on decisions relating to how environmental water holdings are managed, and how water planning provides for environmental water. It could also impact on the nature and extent of limitations on private water allocations. Although the precise impact cannot be known until the right's content has been clarified, it is certainly possible that constitutional recognition of the HRTHE could assist in increasing prioritisation of environmental protection considerations in government decision-making.

6.5.4 Safeguards against environmental protection rollbacks

One of the posited benefits of legal recognition of the HRTHE is protection against 'rollbacks' on environmental protection, as the right could operate as a backstop to prevent governments from winding back environmental protection measures.[102] A constitutionally recognised right could operate in this manner, as decisions to remove environmental protection measures could be characterised as breaches of the constitutionally protected right to a healthy environment. Until the content of the right is known, it is difficult to ascertain precisely what the right guarantees as a minimum entitlement. However, as argued earlier it is likely that the right would guarantee a certain minimum level of environmental health, and would oblige the government to maintain adequate systems for achieving sustainable environmental management. In the water resources context, rollbacks could accordingly include actions that threaten the sustainability of water resources, such as over-allocations

[102] Boyd's research has demonstrated that this 'theoretical advantage' has been proven in practice in relation to constitutional recognition of the right: Boyd, above n 70, 236.

of water access entitlements, and permits to pollute. Depending on the content of the right, it could also potentially include rollbacks on procedural aspects of the right, such as the right to access environmental justice or information about the environment. It would arguably be more difficult for a government to justify such rollbacks if these rollbacks were characterised as potential human rights violations. The potential operation of the right as a limitation on Commonwealth power in this regard can be demonstrated by consideration of the operation of the right to vote, which has been held to limit the scope of Commonwealth legislative power.

In *Roach v Electoral Commissioner* (2007) 233 CLR 162, the High Court declared amendments to Commonwealth legislation invalid which prohibited people serving *any* sentence of imprisonment from voting in federal elections. The Court reasoned that as the *Constitution* provides for a system of representative government and expressly dictates that the houses of the Commonwealth parliament must be 'directly chosen by the people' (ss 7 & 24), there must be a sufficient rationale for determining the circumstances under which an individual's right to vote may be removed.[103] Prior to the amendments, the legislation had only operated to prohibit people serving a sentence of imprisonment of three years or longer from voting. The Court accepted that basing exclusion on the length of the sentence constituted a sufficient reason for exclusion, as their conduct had presumably demonstrated 'such a rejection of civic responsibility as to warrant temporary withdrawal of a civic right'.[104] However, denying the right to vote to *all* prisoners constituted an abandonment of 'any attempt to identify prisoners who have committed serious crimes by reference to either the term of imprisonment imposed or the maximum penalty for the offence'.[105] According to the Court, this 'broke the rational connection necessary to reconcile the disenfranchisement with the constitutional imperative of choice by the people'.[106]

Accordingly, it can be seen that the constitutionally protected right to vote operated to limit the scope of Commonwealth legislative power. Similarly, a constitutionally protected right to a healthy environment could operate to limit the scope of Commonwealth legislative power on various subject matters. For example, if the content of the right is interpreted to

[103] *Roach v Electoral Commissioner* (2007) 233 CLR 162, 165.
[104] Ibid 175.
[105] Ibid.
[106] Ibid 182.

include both substantive and procedural aspects, legislation purporting to limit the rights of individuals to access information about the state of the environment, or to protest in response to environmental decision-making could be held to be inconsistent with the right. If the right is conceived as setting a minimum standard of environmental quality, it could be utilised as a means of preventing and invalidating legislation or executive action which sought to undermine this standard in some way. Although the precise operation of a constitutionally recognised HRTHE is dependent on the content of the right, it is possible that it may operate to prevent and address rollbacks on environmental protection.

6.5.5 Safety net by filling gaps in environmental legislation

One of the identified benefits for environmental protection associated with constitutional recognition of the right, is the right's ability to provide a 'safety net' by 'filling gaps' in legislation.[107] Through the process of constitutional interpretation, it is possible that the court could use the constitutional right to 'fill gaps' in environmental legislation. Gaps in legislation may occur where legislation fails to adequately address emerging and complex threats to environmental health. By recognising the right under the *Constitution*, the court may be able to provide remedies to address such gaps. A prime example in the water resources context for instance could be the threat to groundwater resources posed by coal-seam gas mining. Whilst a legal and policy response has now been mounted to address the issue, in the absence of such a response the right could potentially have operated to fill the gap that existed in the legal framework.[108] In order to respect the right, serious threats to crucial natural resources must be adequately regulated. Although it is not yet possible to determine exactly how constitutional interpretation of the right could be utilised to fulfil this gap-filling function, it is certainly possible that constitutional recognition of the right could assist in addressing gaps in Australia's system for environmental protection.

6.5.6 Avenues to bring legal actions in the interests of environmental protection

Another identified benefit associated with constitutional recognition of the HRTHE is increased public involvement in environmental protection, leading to increased

[107] For examples, see Boyd, above n 70, 235-236.
[108] As noted earlier in Chapter Two, a 'water trigger' was inserted into the EPBC Act in order to address the impacts of coal seam gas mining on water resources: Department of the Environment (Cth), *Water Resources – 2013 EPBC Act Amendment – Water Trigger* <http://www.environment.gov.au/epbc/what-is-protected/water-resources>.

accountability.[109] It is possible that a constitutionally recognised HRTHE could create a new legal cause of action which could enable relevant individuals to challenge government decision-making in the interests of environmental protection.[110] Although various avenues for legal recourse exist to seek remedy for environmental harm, environmental protection advocates continue to encounter various barriers to their attempts to bring legal actions in the public interest (such as the issues associated with costs and standing discussed in Chapter Five). Providing advocates with the opportunity to bring actions challenging the validity of legislative and executive action on the basis of a breach of a constitutionally protected fundamental human right could significantly expand the legal options available for public participation in the enforcement of environmental protection standards.

At present, environmental protection advocates often utilise indirect arguments to challenge or uphold legislation in the interests of environmental protection. Similarly, opponents of legislative regimes aimed at improving environmental protection are able to challenge legislative and executive action on indirect grounds. Two illustrative examples from the water management context are the previously mentioned cases of *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 ('*ICM*') and *Arnold v Minister Administering the Water Management Act 2000* (2010) 240 CLR 242 ('*Arnold*'), where Commonwealth legislation modifying water entitlements was challenged on the basis that it either contravened the constitutional guarantee to provide adequate compensation for the acquisition of property, and/or constituted an invalid exercise of executive/legislative power in contravention of s 100 of the *Constitution*.

Accordingly, although what the plaintiffs opposed was the extent of reduction of agricultural water entitlements in order to provide water for the environment, they challenged the law on indirect grounds. Instead of being able to invite the Court to answer the question of whether or not the law upheld or violated a right to a healthy environment, the Court was asked to consider whether the reduction in water entitlements constituted an 'acquisition of property'. This led to a complex discussion as to the meaning of 'acquisition' and the meaning of 'property' within the meaning of the provision under the *Constitution*. Although issues

[109] Boyd, above n 70, 239-241.
[110] However, it must be noted that the 'High Court has not…recognised that the Constitution could itself create and sustain causes of action and remedies independently of the common law': Williams and Hume, above n 10, 157.

relating to the overall environmental protection aims of the legislative scheme (to return water systems to a state of environmental health) were considered in the course of this analysis, the main focus was not placed on the heart of the dispute, which was essentially a conflict between private interests in water use and the public interest in environmental protection.

It is a matter of debate as to whether it would be preferable from an environmental protection perspective for the judiciary to actively engage with these issues directly. To do so would raise important questions regarding the competency of the judiciary to pass judgment on questions of distributive justice, on often complex and politically contentious issues. Arguably, it is more appropriate that the judiciary is limited to consideration of legal grounds, as it ensures that key policy and planning decisions about environmental management are left to the political arms of government. However, it could certainly open up more avenues to bring legal actions directly in the interests of environmental protection. The possibility of litigation could have a positive proactive impact by encouraging lawmakers and decision-makers to act in a manner consistent with the right. The potential for legal challenge could accordingly act as an accountability mechanism, which might prevent the passage of incompatible laws, or the making of inconsistent decisions.

The right may also further avenues to pursue environmental protection through assisting arguments to expand standing. At present, the common law test for standing requires the parties to have a 'special interest' in the subject matter of the proceeding.[111] A key requirement is that they must be able to demonstrate an interest over and above that of a general member of the public.[112] The HRTHE recognises that environmental protection is in the interests of all human beings. Accordingly, constitutional recognition of the right could help to demonstrate that in proceedings concerning environmental protection it is unnecessary to establish a 'special' interest over and above that of general members of the public, as all members of the public share an interest in maintaining a healthy environment. The requirement to establish a special interest has proven challenging for various individuals and organisations seeking to establish standing in environmental protection cases.

[111] *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493.
[112] Ibid.

Expanding standing could significantly assist environmental protection advocates to enforce environmental protection legislation, and to challenge government decision-making.

6.5.7 Inform environmental quality standards

The human right to a healthy environment recognises that human beings have the right to live in a natural environment which is conducive to human health and wellbeing. Accordingly, it may guarantee a certain minimum standard of environmental quality.[113] Constitutionally entrenching the HRTHE could be viewed as a means of constitutionally guaranteeing a minimum standard of environmental quality. In order to meet this standard, the government would need to pass legislation to ensure the achievement of adequate environmental quality standards. In Australia, there is no federal environmental protection authority with the power to set national binding environmental quality standards and pollution regulations. It is possible that constitutional recognition could inspire the Commonwealth to enact federal legislation which stipulated national legislation creating such mandatory standards and pollution reduction targets, to be implemented and enforced either by a newly formed Commonwealth Environmental Protection Authority (EPA), or by state/territory EPAs.[114]

In the case study context of water quality management, there are various means available to the Commonwealth to increase its role in this regard. One potential avenue would be for the Commonwealth to adopt the American model, which would involve the establishment of a federal EPA, with the power to set national water quality standards and pollution regulations.[115] Unlike Australia, in the American system the Federal government has established a legislative regime to regulate water pollution, enforced by a federal

[113] Boyd argues that '[t]he right to a healthy environment should, in theory, provide a minimum standard of environmental quality for all members of society': Boyd, above n 96, 22.
[114] In the water quality context see generally, Anthony Moeller and Jennifer McKay, 'Is there Power in the Australian Constitution to make Federal Laws for Water Quality?' (2000) 17 (4) *Environmental and Planning Law Journal* 294. See also the recommendation by Professor Rob Fowler advocating for the introduction of a Commonwealth EPA on the grounds that 'a strong and independent Federal EPA is the best way to depoliticise environmental assessment, and guarantee the integrity of the process': Rob Fowler cited in ABC, *Federal EPA Would Depoliticise Environmental Assessment – Expert*, 28 May 2014 <http://www.abc.net.au/radionational/programs/breakfast/federal-epa-would-depoliticse-environmental-assessment---expert/5482980>.
[115] This proposal was put forward by Roberts and Craig: A M Roberts and R K Craig, 'Regulatory Reform Requirements to Address Diffuse Source Water Quality Problems in Australia: Learning from US Experiences' (2014) 21 (1) *Australasian Journal of Environmental Management* 1, 8.

Environment Protection Agency.[116] Australia does not have an equivalent national environmental regulatory authority, or an equivalent piece of federal water pollution legislation. Increasingly, there have been calls for more Commonwealth involvement in environmental matters generally, and water management specifically.[117] Achieving this however will involve overcoming significant constitutional, political and practical hurdles. However, unlike the American model, any Australian model would ideally ensure that the EPA has sufficient power to compel states to comply with federal water pollution reduction targets (rather than simply relying upon the threat of 'losing federal grant money' as is currently the case under the American system).[118] Adopting this approach would involve a significant departure from the current model of co-operative federalism regarding natural resource management in general, and water pollution in particular.

Alternatively, the Commonwealth could enact federal water quality legislation stipulating mandatory water quality standards and pollution reduction targets, to be implemented and enforced by state EPA's.[119] In order to abide by these national standards and pollution reduction targets, the States would have to implement policies, laws and programs designed to reduce water pollution.[120] Adopting one of these possible approaches could assist environmental protection in this context, given the shortcomings of the current approach in regards to various water quality and pollution problems, such as the problem of diffuse source water pollution. As explained by Gunningham and Sinclair, 'policy-makers have chosen to address [diffuse source water pollution from agriculture] largely through

[116] United States Environmental Protection Agency, *Summary of the Clean Water Act* <http://www.epa.gov/lawsregs/laws/cwa.html>.
[117] Although it must be noted that there are numerous entities/individuals opposed to the Commonwealth expanding its role.
[118] Rebecca Nelson, 'Regulating Nonpoint Source Pollution in the US: A Regulatory Theory Approach to Lessons and Research Paths for Australia' (2011) 35 *University of Western Australia Law Review* 340, 356. There have been numerous criticisms made of the American approach to diffuse source water pollution management. For example, see Albert Ettinger,'Water Pollution, Agriculture, and the Law (or Lack of Law)' (Paper presented at the 2009 Governor's Conference on the Management of the Illinois River System 'Looking Back, Moving Forward', October 20-22, 2009) <http://ilrdss.sws.uiuc.edu/pubs/govconf2009/Plenary2/Ettinger.pdf>.
[119] Moeller and McKay, above n 114.
[120] There is a significant body of literature dedicated to assessing the effectiveness of various policies/laws/programs to address diffuse source pollution in the US. See, eg, Carolyn M. Johns, *Effective Policy Regimes for the Management of Non-point Source Water Pollution: Ontario and the US in Comparative Perspective* (2001) <https://ozone.scholarsportal.info/bitstream/1873/8143/1/10294253.pdf>; J M Gerstein, D J Lewis, K Rodrigues, J M Harper, J Kabashima, *State and Federal Approach to Control of Nonpoint Sources of Pollution* (2006) University of California Agriculture and Natural Resources Communication Services Publication 8203 <http://anrcatalog.ucdavis.edu/pdf/8203.pdf>.

voluntarism', which they argue is 'politically acceptable' but has proven to be 'manifestly unsuccessful'.[121]

Voluntary 'beyond compliance' measures in the context of diffuse source water pollution from the agricultural industry include such things as voluntarily opting for less environmentally harmful fertilisers, implementing land use changes which would reduce run-off containing pollutants into waterways and reducing the quantity and frequency of fertiliser use.[122] In the absence of sufficient incentives to undertake these voluntary (and generally more expensive) measures, it is extremely optimistic to presume that a voluntary system would be sufficient to encourage effective action. In Australia and the MDB in particular, voluntarism has proven to be a less than ideal approach. Accordingly, approaches which are more coercive could potentially help to address the issues created by reliance on industry voluntarism. If constitutional recognition of the HRTHE could help to facilitate the adoption of these approaches, it could assist in addressing these challenges. As this example demonstrates, constitutional recognition of the HRTHE could impact both on the content of environmental quality standards, and their implementation.

[121] Neil Gunningham and Darren Sinclair, 'Policy Instrument Choice and Diffuse Source Pollution' (2005) 17 (1) *Journal of Environmental Law* 51, 80. For an interesting discussion about 'beyond compliance' measures adopted by businesses and the concept of 'bounded rationality' see Neil Gunningham and Darren Sinclair, 'Designing Smart Regulation' in Bridget M Hutter, *A Reader in Environmental Law* (Oxford University Press, 1999) 305, 322.
[122] Gunningham and Sinclair (2005), ibid 61-64.

6.6 Limitations of a constitutional right as a tool for environmental protection in Australia

The previous section considered the legal consequences which might result from the form of constitutional recognition proposed, and demonstrated that a number of the legal consequences which may flow from constitutional recognition of the right could be perceived to operate as benefits for environmental protection in Australia. In particular, a potentially increased scope for Commonwealth intervention in environmental protection, increased governmental accountability through expanded options for public interest environmental litigation, and constitutional guidance for environmental legislation. Whilst there are certainly a number of ascertainable potential benefits associated with constitutional recognition of the HRTHE, there may be some limitations regarding the utility of the right as a tool for environmental protection. It is important to consider two main criticisms, namely, that the right may prove to be either redundant or dangerous in its operation.

6.6.1 Redundant or dangerous

If the experience with other express constitutional rights is any indication, a constitutionally recognised HRTHE is unlikely to be redundant. Despite the often conservative interpretive approaches adopted by the High Court, existing express constitutional rights have had various significant impacts on the Australian political and legal systems. For instance, as a result of the existence of a constitutional right to trial by jury for indictable Commonwealth offences (s 80), criminal defendants have been able to challenge the compatibility of jury practice with the constitutional right.[123] Unlike statutory recognition of the right, constitutional recognition empowers the court to invalidate executive and legislative action which violates the right (and presumably also fails a test of proportionality). If accompanied by the creation of a legislative power over the subject matter of the 'environment', it may also empower the legislature to pass laws to help realise the right. It is however important to note that depending on how the right is recognised, express constitutional recognition of the right under the *Commonwealth Constitution* may not bind the states. As the majority of environmental policy, planning and assessment and approval processes take place at the state/territory level, this could impact on the utility of the right as a tool for environmental

[123] Joseph and Castan, above n 57, 406-413.

protection.[124] For this reason, it has also been recommended that the states and territories recognise the right within their constitutions and self-governing legislation respectively.

It is possible that far from being redundant, the right could be considered 'dangerous'. A key concern in this respect relates to the role of the judiciary. As noted earlier, enacting a constitutionally entrenched bill of rights could significantly modify the role of the judiciary in environmental decision-making. Courts have taken a very active role in regards to implementation of the right in various countries where the right has received constitutional recognition, including Costa Rica, Argentina and the Philippines. For example, in Costa Rica, the Constitutional Chamber has interpreted the scope of the right 'broadly':

> It has held that the right requires not only that the State refrain from direct violations, but also that it protect against violations from others, and in this regard, it has underscored the role of the State as the guarantor for the protection and safeguarding of the environment and natural resources. Although plaintiffs may not necessarily demand that the State take a particular course of action, they are entitled to insist that the State adopt measures that are suitable for the protection of the right.[125]

In the report on his mission to Costa Rica, the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, noted that the Court has utilised its powers to invalidate legislative and executive action in reliance on violations of the right.[126] This constitutional jurisprudence has directly impacted on the way in which the parliament and the executive have chosen to address environmental protection in specific contexts.

To understand how the Australian judiciary may interpret a constitutionally entrenched HRTHE, it is useful to examine the High Court's approach to the interpretation of existing express constitutional rights. Whilst existing constitutional rights are not analogous in form or nature to the proposed HRTHE, the interpretive approach adopted by the Court is representative of the Court's general approach to rights interpretation. Joseph and Castan argue that with the exception of the interpretation of s 51 (xxxi), 'the express constitutional

[124] However, through the operation of s 109 of the *Constitution*, any state legislation which was inconsistent with federal legislation passed to protect the right, would be invalid to the extent of the inconsistency.
[125] John Knox, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment on his mission to Costa Rica (28 July-1 August 2013)*, UN GAOR, 25th sess, Agenda Item 3, UN Doc A/HRC/25/53/Add.1 (8 April 2014) annex I [23].
[126] Ibid.

rights have a history of narrow, even pedantic, interpretation'.[127] It is accordingly unlikely that the Court would adopt a more expansive interpretative approach in regards to the HRTHE. Indeed, it is more likely that the Court would adopt a more conservative approach to the interpretation of the right, given that it would be the first and only right of its nature within the *Constitution*.

However, regardless of the interpretive approach adopted, it is true that the Court would be charged with the interpretation of the meaning of the term 'right to a healthy environment', and its application to specific cases. Accordingly, the Court would be granted significant power with respect to the nature, scope and operation of the right. The Court adopts various interpretive approaches to determine the meaning of constitutional terms. As a result of this interpretive disagreement, the meaning of key constitutional terms can evolve over time. The application of different tests and approaches can result in significantly different substantive outcomes. For instance, the High Court's interpretation of the term 'religion' under s 116 of the *Constitution* has resulted in a wide range of purportedly religious groups falling within the definition of the term.[128] However, it would have been open to the Court to adopt a more restrictive interpretation, thus excluding more groups from the application of the section. Similarly, in the context of the proposed HRTHE, the Court would be tasked with determining the definitions of the key terms of the provision creating the right.

It is accordingly possible that the right could be inappropriately used as a vehicle by activist judges to invalidate laws passed by the Parliament, in order to achieve policy objectives. In this sense constitutional recognition of the right could be viewed as 'dangerous', as it is open to abuse. However, the history of the High Court's jurisprudence on express constitutional rights indicates that judicial activism in this regard is unlikely. Even where the Court has indicated a willingness to engage in interpretive creativity with the elucidation of 'implied' freedoms, it has adopted a conservative approach to their development. Moreover, a constitutionally entrenched HRTHE would possibly be subject to a test of proportionality.[129] This would act as a restraint on the ability of the Court to invalidate laws where there is

[127] Joseph and Castan, above n 57, 427.
[128] Ibid 415.
[129] For an explanation of the approaches to proportionality in Australian rights jurisprudence, see: Gabrielle Appleby, 'Proportionality and Federalism: Can Australia learn from the European Community, the US and Canada?' (2009) 26 (1) *University of Tasmania Law Review* 1.

'prima facie incompatibility'.[130] The combined effect of a conservative interpretive approach, and a proportionality test, would limit the potential 'dangers' associated with judicial interpretation and application of the right.

Further concern may relate to the right's possible impact on the federal balance of power between the Commonwealth and state/territory governments. Ultimately, the specific dangers in this regard are dependent on the form of recognition adopted. For instance, granting the Commonwealth a head of legislative power over the 'environment' as a subject matter directly would have significant consequences for the federal division of power in the environmental protection context. Whereas, recognising the right within the context of a broader constitutionally entrenched bill of rights would arguably have less consequences for the federal division of power, and more consequences for the separation of powers between the different arms of government.

A further concern relates to 'unintended or unlikely consequences' flowing from recognition.[131] As noted by former High Court judge, Ian Callinan, in other jurisdictions where constitutional rights have been adopted in a bill of rights, unintended consequences have resulted.[132] This is an inevitable consequence of the adoption of constitutionally entrenched rights, and only supports an argument against constitutional recognition of human rights more generally. Accordingly, it does not mitigate in particular against constitutional recognition of the HRTHE. However, it must be recognised that given the broad and complex nature of environmental protection, it is difficult to predict the full range of consequences which may result from recognition.

6.6.2 Likelihood of constitutional recognition

Regardless of whether constitutional recognition of the right would be useful, redundant or dangerous, it is unlikely that the HRTHE would receive constitutional recognition in Australia in any form. This can be attributed to three main factors. Firstly, the amendment procedure outlined under s 128 creates a significant hurdle to reform. As discussed earlier,

[130] Joseph and Castan, above n 57, 511.
[131] I D F Callinan and Amanda Stoker, 'Politicizing the Judges: Human Rights Legislation' (2011) 30 *University of Queensland Law Journal* 1 55, 56.
[132] Ibid.

the s 128 amendment procedure renders it very difficult to amend the *Constitution*, as it requires a high level of agreement. Achieving this level of agreement in relation to such a politically contentious reform would appear to be highly unlikely. Secondly, there has been a historical reluctance to entrench express rights in the *Constitution* via referendum. As noted by Stone and Barry, there have been two proposals taken to referendum involving the introduction of express rights into the *Constitution*, and they were both unsuccessful.[133] It is accordingly unlikely that a more significant expansion of rights recognition would succeed. Finally, the potentially controversial nature of the right may mean that even if a constitutionally entrenched bill of rights was introduced, the HRTHE would not be included. It is most likely that only civil and political rights would be recognised, and that any recognition of economic, social and cultural rights would be limited to more established rights.

[133] Bruce Stone and Nicholas Barry, 'Constitutional Design and Australian Exceptionalism in the Adoption of National Bills of Rights' (2014) 47 (4) *Canadian Journal of Political Science* 767, 776.

6.7 Conclusion

Is it possible to recognise the human right to a healthy environment under the Australian Constitution? If so, what is the most preferable form of recognition? Can the potential benefits for environmental protection identified for domestic legal recognition be realised through the preferable form of constitutional recognition? How could these benefits be realised in the Australian water management context? What are the potential limitations?

The purpose of this chapter was to determine whether it is possible to recognise the human right to a healthy environment under the *Australian Constitution*, and if so, whether there are any potential benefits for environmental protection associated with such recognition. It was concluded that it is possible for Australia to expressly recognise the human right to a healthy environment under the *Australian Constitution*, via the amendment procedure outlined under s 128. It was explained that the right could be recognised in a constitutionally entrenched bill of rights, or as an independent right contained within another section of the *Constitution* (the Preamble, an existing chapter, or a new section). It was argued that recognition of the HRTHE within a constitutionally entrenched bill of rights would be the most preferable form of recognition, as it would enable the right to be recognised in the context of other human rights. There are a number of potential consequences which could flow from this form of constitutional recognition of the right, including clarification of federal and state/territory roles in environmental management and protection, and modification of the scope of Commonwealth legislative power.

It was argued that a number of the consequences of constitutional recognition of the right could help realise the potential benefits for environmental protection associated with legal recognition of the right outlined in Chapter Five. In particular, it was contended that constitutional recognition of the right may help to strengthen environmental laws and policies, increase avenues for public participation in environmental decision-making, and increase prioritisation of environmental protection considerations in government decision-making, laws and policies. Consideration of the potential realisation of these identified benefits in the case study context of water resources management supported these conclusions. Possible criticisms of the right were considered, including the claims that the right may prove to be either redundant or dangerous in its operation. It was argued that the right would be unlikely to prove redundant in its operation, in light of the significant impact of existing constitutional rights and freedoms on the Australian legal and political systems, and experience with operation of the right in other jurisdictions. Moreover, given the role of

the judiciary in relation to the interpretation and application of the right, it was argued that constitutional recognition could have potentially significant impacts on environmental protection in Australia. Whilst it was recognised that this modified role for the judiciary could be viewed as 'dangerous' as it may create opportunities for judicial activism, it was argued that the judiciary would be more likely to adopt a conservative approach to interpretation and application of the right. However, it was acknowledged that constitutional recognition of the right would involve the judiciary in potentially politically contentious environmental policy questions which would constitute a significant departure from the status quo. This modified judicial role may not necessarily be viewed as beneficial for environmental protection, although it would certainly increase opportunities to challenge government decision-making in the environmental protection context.

Despite the potential identified benefits associated with constitutional recognition, it was concluded that any form of constitutional recognition would be highly unlikely at present. This was attributed to three main factors, including the difficulties posed by the amendment procedure under s 128, the historical reluctance to entrench express rights in the *Constitution* via referendum, and the potentially controversial nature of the right. Accordingly, the next chapter considers the options for legislative recognition of the right in Australia.

Chapter Seven
Legislative Recognition of the Human Right to a Healthy Environment in Australia

Is it possible to provide legislative recognition of the human right to a healthy environment in Australia? If so, what is the most preferable form of legislative recognition? Can the potential benefits for environmental protection identified for domestic legal recognition be realised through the preferable form of legislative recognition? How could these benefits be realised in the Australian water management context? What are the potential limitations?

7.1 Introduction

Although constitutional recognition of the human right to a healthy environment in Australia is highly unlikely at present, it is possible to recognise the right within federal and state/territory legislation. Legislative recognition of human rights has been the preferred method of legal recognition in Australia.[1] However, recognition has favoured civil and political, rather than economic, social and cultural rights. As an ESC right, the right to a healthy environment would inevitably face various obstacles to its recognition, especially if it were deemed justiciable.

This chapter explains that there are various options for legislative recognition of the human right to a healthy environment in Australia. Recognition could occur at the Commonwealth or state/territory levels, and in various different forms. Whilst Chapter Six considered the options for constitutional recognition, this chapter concentrates exclusively on the options for legislative recognition (Options 6-11). The aim of this chapter is to explore the potential options available, with a view to identifying the most preferable form of legislative recognition in the current political climate. It is argued that federal and state/territory statutory recognition of a dialogue model bill of rights recognising an independent human right to a healthy environment is the most preferable form of legislative recognition for various reasons, including the fact that it enables the right to be recognised in the context of other human rights. The chapter considers how implementing the dialogue model could potentially impact on environmental protection by considering whether the set of benefits discussed in Chapter Five

[1] For example: *Age Discrimination Act 2004* (Cth); *Disability Discrimination Act 1992* (Cth); *Sex Discrimination Act 1984* (Cth); *Racial Discrimination Act 1975* (Cth).

may be realised in this context. In order to evaluate the realisation of these potential benefits in a specific environmental protection context, it considers how the identified benefits may be realised in the water management context. It is argued that various potential benefits may be realised, including increased consideration and prioritisation of environmental protection considerations in government decision-making and potentially increased avenues to challenge government decision-making. Finally, the chapter evaluates the limitations of the proposed form of legislative recognition of the right as a tool for environmental protection. In particular, it addresses concerns that the right may prove to be redundant or dangerous in its operation.[2]

It is concluded that whilst there are some potential benefits associated with legal recognition, the right is a limited legal tool for improving environmental protection. This is due partly to the nature of the proposed form of legal recognition (the dialogue model), and partly to the broad systemic nature of many of the challenges currently facing environmental protection. It is argued that in many instances, systemic or cultural change is required in order to adequately address environmental protection challenges. Whilst recognition of the right may be capable of providing an impetus for such change, it cannot of itself address many of the key problems impeding the achievement of ecologically sustainable development. However, acknowledging its limitations and potential drawbacks, it is argued that the right could prove to be a useful additional mechanism for assisting environmental protection in Australia.[3]

[2] Boyd lists 'redundant' as one of the main criticisms of the constitutional right to a healthy environment: David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (UBC Press, 2012) 33.

[3] Boyd reached a similar conclusion in regards to constitutional recognition of the right: 'Nobody is suggesting that the constitutional right to a healthy environment is a silver bullet capable, on its own, of securing a sustainable future. Instead, constitutional recognition of the right to a healthy environment should be viewed as a useful additional tool for the societal actors engaged in the process of attempting to transform today's unsustainable societies': ibid 287.

7.2 Commonwealth legislative power

In order to evaluate the options for legislative recognition of the right at the Commonwealth level, it is first necessary to determine whether the Commonwealth Parliament possesses the requisite legislative power to pass legislation recognising the right. There are various heads of legislative power under the *Australian Constitution* which may possibly enable the Commonwealth to pass legislation recognising the human right to a healthy environment.[4] However, this chapter focusses on the main potential source of legislative power, namely the external affairs power under s 51 (xxix) of the *Constitution*.

7.2.1 External affairs power

The Commonwealth Parliament has legislative power to pass 'laws for the peace, order, and good government of the Commonwealth' with respect to the subject matter of 'external affairs'.[5] Despite the existence of a significant body of judicial commentary on the interpretation of the term 'external affairs', the High Court has failed to fully elucidate the meaning and scope of the power. Although the adoption of different interpretive approaches has produced varying conclusions about the scope of the power, a general trend towards the expansion of Commonwealth power can be discerned. Over the past 30 years, the power has been considered in various cases, and accepted by the Court as supporting a diversity of legislation. This has ranged from laws giving effect to international legal obligations agreed to under international treaties,[6] to laws retrospectively criminalising past conduct committed in another country by individuals who were not Australian citizens at the time of committing the offence.[7]

In light of the broad scope of the power, Sir Harry Gibbs has argued that it 'is hardly an exaggeration to say that it would not make any practical difference if the word 'anything'

[4] Pamela Tate has summarised the situation with respect to potential sources of legislative power for a federal Charter of Rights, concluding that the external affairs power would most likely be the 'principal source of power'. She argues that it is possible but unlikely that the implied nationhood power could be of relevance, and states that it is also 'unlikely that the corporations power would play any, or any central, role', as well as any 'of the other enumerated powers in s 51 of the Constitution'. However, she does note the potential relevance of the race power 'if special indigenous rights are recognised': Pamela Tate, 'Human Rights in Australia: What Would a Federal *Charter of Rights* Look Like?' (2009-10) 13 *Southern Cross University Law Review* 1, 10.
[5] *Australian Constitution*, s 51 (xxix).
[6] *Commonwealth v Tasmania* (1983) 158 CLR 1.
[7] *Polyukovich v The Commonwealth* (1991) 172 CLR 501.

were substituted for 'external affairs''.[8] Although there is some truth to this statement, especially given the broad range of topics covered by the ever increasing number of treaties at the international level,[9] various judges have attempted to put forward definitions to delimit the scope of the power. One leading example is drawn from *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*'), where Justice Mason stated that 'to be a law with respect to external affairs it is sufficient that it':

> (a) implements any international law, or
> (b) implements any treaty or convention whether general (multilateral) or particular, or
> (c) implements any recommendation or request of the United Nations Organization or subsidiary organizations such as the World Health Organization, the United Nations Educational, Scientific and Cultural Organization, the Food and Agriculture Organization or the International Labour Organization, or
> (d) fosters (or inhibits) relations between Australia or political entities, bodies or persons within Australia and other nation States, entities, groups or persons external to Australia, or
> (e) deals with circumstances or things outside Australia, or
> (f) deals with circumstances or things inside Australia of international concern. [10]

As can be seen from this broad definition, the scope of the power is potentially far ranging, extending beyond the geographical jurisdiction of Australia. Although there is significant debate as to the parameters of the power's scope, there are generally considered to be four main categories which may be used to establish that legislation can be supported by the external affairs power.[11] Namely, extraterritorial power, relations with other countries, implementation of treaties, and matters of international concern.[12] Recognition of an obligation under customary international law may also enliven the power.[13] Of the main four available categories, the latter three are most relevant to the implementation of the human right to a healthy environment. Each of these categories and customary international law will be considered in turn, in order to determine whether they could act as the basis for legislation recognising the right. To defend the validity of legislation implementing the right, the Commonwealth would only be required to establish one possible source of the right. Conversely, anyone wishing to challenge legislation recognising the right would need to disprove the application of all available heads of legislative power. Accordingly, in order to demonstrate that the Commonwealth has the legislative power to pass legislation recognising

[8] Gibbs cited in George Winterton, 'A Framework for Reforming the External Affairs Power' (Paper presented at the Fifth Conference of The Samuel Griffith Society, Sydney, 1995) <http://www.samuelgriffith.org.au/papers/html/volume5/v5chap2.htm>.
[9] Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Thomson Reuters, 3rd ed, 2010) 141.
[10] *Commonwealth v Tasmania* (1983) 158 CLR 1, 171 (Mason J).
[11] Joseph and Castan, above n 9, 115.
[12] Ibid.
[13] Ibid 140.

the right, it is only necessary to demonstrate that at least one possible head of legislative power is available.

7.2.1.1 Implementation of treaties

For an international treaty ratified by the Commonwealth Executive to pass into law in Australia it must be enacted into Australian law through the legislative process.[14] The external affairs power has been used to justify legislation implementing a range of international treaty obligations, including environmental law treaties (such as the *Convention Concerning the Protection of the World Cultural and Natural Heritage*),[15] and human rights treaties.[16] However, whilst it has been established through a series of high profile High Court decisions that the Commonwealth can rely upon the external affairs power to 'implement all of its treaty obligations regardless of their subject matter', there are a number of preconditions to the operation of the rule.[17] In particular, there has been judicial discussion concerning the possible requirement that the law in question must implement a treaty 'obligation'.[18] However, the Court's validation of legislation implementing non obligatory treaty provisions in *Victoria v Commonwealth* (1996) 187 CLR 416, casts doubt on the necessity of this requirement.[19] Moreover, in the earlier case of *Richardson v Forestry Commission* (1988) 164 CLR 261, the majority stated that as 'the external affairs power is a plenary power, it extends to support a law calculated to discharge not only Australia's known obligations but also Australia's reasonably apprehended obligations'.[20] Accordingly, as a result of this authority, it is now possible for the Commonwealth to pass legislation which implements non obligatory treaty provisions, and treaty obligations which are 'reasonably apprehended to exist'.[21] However, there are limits to this power. The treaty provisions must evince a certain degree of

[14] Ibid 124.
[15] *Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 23 November 1972, 1037 UNTS 151 (entered into force 15 December 1975). The Convention was implemented domestically through the passage of Commonwealth legislation, *World Heritage Properties Conservation Act 1983* (Cth). The constitutional validity of the legislation was challenged in *Commonwealth v Tasmania* (1983) 158 CLR 1. Although the majority of the Act survived this challenge, the legislation has been repealed and replaced by the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).
[16] For instance, the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, UNTS 660 195 (entered into force 4 January 1969) was domestically implemented through the passage of Commonwealth legislation: *Racial Discrimination Act 1975* (Cth).
[17] Joseph and Castan, above n 9, 128.
[18] See the discussion of this jurisprudence in ibid, 128-131.
[19] Ibid 131.
[20] *Richardson v Forestry Commission* (1988) 164 CLR 261, 295 (Mason CJ and Brennan J).
[21] Ibid.

'specificity', as maintaining otherwise would allow the Commonwealth to legislate for the implementation of broad and vague aspirations contained within international treaties.[22]

As discussed earlier, there is no international treaty explicitly recognising the human right to a healthy environment. However, there are various treaties dealing with the subjects of both environmental protection and human rights more generally, which Australia has signed and ratified. If the right can be sourced from obligations contained within some of these treaties (or obligations 'reasonably apprehended to exist'), it may be possible for the Commonwealth to pass laws to ensure their domestic implementation. As discussed earlier in Chapter Four, the right can be viewed as a derivative right from various rights contained within the ICESCR. Accordingly, legislation recognising the right to a healthy environment could potentially be supported as a legitimate exercise of the external affairs power, on the basis of the implementation of these treaty obligations. Although there is no express obligation to recognise the human right to a healthy environment, the obligation could be viewed as incidental to the implementation of the obligations to recognise and protect the rights to life, property and health under the ICESCR.

If the interpretation of the ICESCR adopted is not accepted, it is possible that the power could be enlivened on the basis of draft declarations or recommendations recognising the HRTHE. For instance, as discussed in Chapter Five, the *Draft Principles on Human Rights and the Environment* ('*Draft Principles*') state that '[a]ll persons have the right to a secure, healthy and ecologically sound environment.'[23] However, it is uncertain whether a statement made in a document prepared by a group of human rights experts which has not been formally adopted by a UN body would suffice to justify the passage of legislation. Other potentially relevant international statements may face similar challenges. Accordingly, reliance on the obligations created under the ICESCR would be preferable, as the Covenant is a treaty establishing state obligations capable of enlivening the power. However, there may be issues as to specificity, given the inherently broad nature of the HRTHE and its lack of explicit recognition. In *Victoria v Commonwealth* (1996) 187 CLR 416, it was explained that '[t]he law must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the

[22] *Victoria v Commonwealth* (1996) 187 CLR 416, 486.
[23] *Draft Declaration of Principles on Human Rights and the Environment*, Fatma Zohra Ksentini, Special Rapporteur, UN Doc E/CN.4/Sub.2/1994/9 (1994) annex 1 [Principle 2].

general course to be taken by the signatory states.'[24] For this reason, it would be ideal if the international community outlined the scope, content and nature of the right in a binding international treaty. Whilst this does not appear likely to occur in the near future, as the foregoing discussion has demonstrated it is possible that this particular category of the external affairs power could be relied upon to provide legislative power for domestic legislation recognising the right.

7.2.1.2 Relations with other countries/international institutions

The Commonwealth may utilise the external affairs power to pass laws with respect to Australia's relationships with other countries, and international organisations.[25] Arguably, a law recognising the human right to a healthy environment would have few direct impacts on Australia's relationships with other countries, except insofar as it may impact on trade with other countries and agreements made under international environmental law. It is however possible that as Australia's natural environment is part of the global environment, legislation impacting on the management of the Australian environment could potentially be considered a law with respect to Australia's relationships with other countries. Recognising the right would have implications for various environmental protection issues which have international implications (such as air quality, marine conservation, and climate change). However, it is more likely that an argument based on the impact of the law on Australia's relationships with international organisations (such as the UN) could be sustained. Australia is a party to various international environmental law agreements, which require Australia to sustainably manage the natural environment. Passing legislation recognising the HRTHE could accordingly impact on Australia's relationship with relevant United Nations bodies. Whilst this is certainly a possible avenue to enliven the power, arguably it constitutes a weaker basis than reliance on implementation of treaty obligations.

7.2.1.3 Matters of international concern

The inclusion of 'matters of international concern' as a separate category for establishing that a law relates to 'external affairs', is a matter of significant debate. Joseph and Castan argue that it may 'provide an additional basis for grounding Commonwealth laws which implement

[24] *Victoria v Commonwealth* (1996) 187 CLR 416, 486.
[25] *R v Sharkey* (1949) 79 CLR 121; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Thomas v Mowbray* (2007) 233 CLR 307.

non-binding standards emanating from international bodies.' [26] However, despite this potential in theory, it has never 'been decisive in establishing the validity of legislation'.[27] Some commentators doubt its potential to expand the scope of the external affairs power. For example, Edson argues that it is 'largely superfluous' as an additional category,[28] as in most instances where a matter can fall within the scope of the category, it can also fall within the scope of another more established category. She argues that the category is probably only capable of producing a potential expansion of the power if the phrase is defined to mean 'a topic of debate, discussion or negotiation in the international arena'.[29] Such an interpretation would grant the power an even broader scope than it already enjoys.

For present purposes, acknowledging the possibility that the category may add something to the scope of the power, it is relevant to consider its application in this context. It is clear that a strong argument can be mounted to support the characterisation of the health of the natural environment as a 'matter of international concern'. Although it can be argued that the health of Australia's environment is a matter of domestic rather than international concern, as noted by Joseph and Castan, 'the acceleration of globalisation in all of its forms…means that more matters are being internationalised, and concomitantly fewer matters are truly "internal" affairs.'[30] Over the past half century, there has been a significant international trend towards the recognition of the importance of environmental protection, and the relationship between environmental protection and the protection of fundamental human rights. However, it is uncertain what evidence and degree of 'international concern' constitutes a sufficient basis for the exercise of the external affairs power. Guidance can be drawn from cases where the issue has received judicial attention, such as the case of *XYZ v Commonwealth* (2006) 227 CLR 532 ('*XYZ*'). In an attempt to establish that the object of Commonwealth legislation ('sexual tourism') was a 'matter of international concern' in *XYZ* the Commonwealth argued that over thirty countries have legislated to address the issue.[31] As the Court was not required to decide the issue in that case, the question as to whether the evidence put forward by the Commonwealth would have sufficed to establish the issue as a matter of international concern remained unresolved. However, it is useful to consider the nature of the evidence put forward,

[26] Joseph and Castan, above n 9,137
[27] Ibid 140
[28] Elise Edson, 'Section 51 (xxix) of the *Australian Constitution* and 'Matters of International Concern': Is There Anything to be Concerned About?' (2008) 29 *Adelaide Law Review* 269, 270.
[29] Ibid 271.
[30] Ibid 142.
[31] *XYZ v Commonwealth* (2006) 227 CLR 532, 606.

as a means of attempting to discern the type of evidence which may be relevant in the context of the human right to a healthy environment.

The Commonwealth put forward a range of evidence in order to establish that sexual tourism constitutes a 'matter of international concern' for the purposes of the external affairs power. This included the adoption of the Convention on the Rights of the Child and its Optional Protocol, appointment of a Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, adoption of UN resolutions on 'international responses to transnational problems of child abuse', and the signing of Memoranda of Understanding with various countries 'designed to combat child sexual abuse committed by Australian nationals in such countries'.[32] They also submitted evidence of the 'enactment of a large number of nation states of legislation providing for criminal offences in respect of sexual conduct of their nationals with children outside the national borders of the states concerned' and a report published by an Australian parliamentary committee on the Bill that introduced the legislation creating the offence in question.[33] Utilising this evidence as a guide, it can be seen that potentially relevant evidence to establish a matter as a matter of international concern includes the adoption of international treaties on the subject, the appointment of international human rights experts to examine the issue, the adoption of UN resolutions, and legislative actions taken at the national level.

In comparison to the evidence of international concern offered in *XYZ*, it can be argued that the expression of international concern about the state of the natural environment and its relevance to human rights protection has been even more substantial, both in terms of jurisdictional reach, and the extent of action taken. Potentially relevant evidence that the human right to a healthy environment constitutes a matter of international concern for the purposes of the external affairs power under the *Constitution*, could include the following:

- The appointment of two Special Rapporteurs on the subject of 'Human Rights and the Environment' by the UN (Madame Ksentini 1989-1994, and Mr John Knox 2015-present). The current Special Rapporteur was appointed from 2012-2015 as an

[32] Ibid 573 (citations omitted).
[33] Ibid.

Independent Expert on human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.[34]

- Creation of a *Draft Declaration of Principles on Human Rights and the Environment* (1994);[35]
- The adoption of resolutions and statements by UN human rights bodies on the relationship between human rights and the environment;[36]
- Recognition of the right to a healthy environment in the national laws of various jurisdictions around the world;[37]
- Creation of international 'soft law' statements recognising the relationship between human rights protection and the protection of the natural environment.[38]

However, even if it were possible to successfully establish that the human right to a healthy environment could constitute a 'matter of international concern', the fact remains that this particular category has 'never been decisive in establishing the validity of legislation'.[39] Accordingly, it is of questionable likelihood that reliance upon this particular category would succeed in enlivening the power. It is more likely that the Commonwealth would be able to utilise the possible evidence of international concern to bolster arguments that a law recognising the right would impact on Australia's relations with international organisations.

[34] United Nations Human Rights Office of the High Commissioner, *Special Rapporteur on Human Rights and the Environment (Former Independent Expert on Human Rights and the Environment* <http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SRenvironmentIndex.aspx>.

[35] *Draft Declaration of Principles on Human Rights and the Environment*, Fatma Zohra Ksentini, Special Rapporteur, UN Doc E/CN.4/Sub.2/1994/9 (1994) annex 1.

[36] As noted by the United Nations Environment Programme, '[i]n a series of resolutions, the former United Nations Commission on Human Rights and the United Nations Human Rights Council have drawn attention to the relationship between a safe and healthy environment and the enjoyment of human rights. Most recently, the Human Rights Council in its resolution 7/23 of March 2008 and resolution 10/4 of March 2009 focused specifically on human rights and climate change, noting that climate change-related effects have a range of direct and indirect implications for the effective enjoyment of human rights.' United Nations Environment Programme, *High Level Expert Meeting on the Future of Human Rights and Environment: Moving the Global Agenda Forward* <http://www.unep.org/environmentalgovernance/Events/HumanRightsandEnvironment/tabid/2046/Default.aspx>.

[37] See generally Boyd, above n 2.

[38] These include the *Stockholm Declaration on the Human Environment*, UN Doc A/CONF.48/14/Rev.1 (1972), and *Rio Declaration on Environment and Development*, 31 ILM 874 (1992).

[39] Joseph and Castan, above n 9, 140.

7.2.1.4 Customary international law

If it can be established that the right has reached the status of customary international law (considered earlier in Chapter Four), a law recognising the right could potentially be supported by the external affairs power. However, as was noted earlier in Chapter Four, there is significant debate as to whether the right can be established under customary international law. Accordingly, it is unlikely that the Commonwealth would place significant reliance on this possible category.

7.2.2 Likelihood of establishing Commonwealth legislative power to recognise the right

As the foregoing discussion has demonstrated, it is possible for the Commonwealth Parliament to establish an argument to justify the exercise of legislative power to pass legislation recognising the human right to a healthy environment. Of the available heads of legislative power, the most relevant power to rely upon is the external affairs power. Such reliance could be based on various grounds, including the characterisation of such a law as a law with respect to the implementation of treaty obligations, relations with other countries/international organisations, and/or potentially also as responding to a 'matter of international concern'. It was argued that the Commonwealth should focus on the argument that a law recognising the human right to a healthy environment is a valid exercise of the Commonwealth's ability to pass domestic legislation as a means of implementing Australia's treaty obligations. It was further argued that the most relevant treaty is the ICESCR, which contains rights from which the human right to a healthy environment may be derived. Reliance upon the other potential categories could also be attempted, however doing so would possibly be more contentious than reliance upon the implementation of treaty obligations.

The following section considers the various forms of legislative recognition which may be available to the Commonwealth. The constitutional validity of the forms of implementation at the Commonwealth level are contingent upon whether they adequately conform to the treaty's object and purpose (if that is held to be the justification for the exercise of the external affairs power), and whether the law is reasonably 'appropriate and adapted' to the achievement of that purpose.[40] Legislation directed towards the topic of a treaty obligation which contravenes its purpose, and/or seeks to pursue a disproportionate means of pursuing

[40] Ibid 508-515.

that purpose, will not be supported by the external affairs power.[41] Moreover, as noted by Gibbs, '[t]he Commonwealth Parliament could not amend a statute containing a bill of rights which was passed to give effect to a treaty, if to do so meant that the statute no longer conformed to the treaty or went beyond it or was inconsistent with it.'[42] Accordingly, the source of legislative power for the legislation could act as a limit on the legislature's power of amendment.[43]

[41] Ibid 134.
[42] Harry Gibbs, 'Does Australia Need a Bill of Rights?' (Paper presented at the Sixth Conference of The Samuel Griffith Society, Carlton, 17-19 November 1995) <http://www.samuelgriffith.org.au/papers/html/volume6/v6chap7.htm>.
[43] As explained by Gibbs (ibid), '[i]n other words, although the Commonwealth Parliament could repeal such a statute, its power to amend it would be limited.'

7.3 Options for Commonwealth legislative recognition

As mentioned above, there are three main options for legislative recognition of the human right to a healthy environment at the Commonwealth level: recognition as an independent right within a statutory bill of rights, recognition as a derivative right under a statutory bill of rights, and recognition as an independent right under specific legislation.

7.3.1 Option Six: Express recognition of the right under a federal statutory bill of rights

Recognising the right as an independent right under a statutory bill of rights is the most ambitious form of federal legislative recognition available. Although various proposals for a Commonwealth Human Rights Act have been raised over the years, none have been implemented in law. In 2009, the National Human Rights Consultation Committee was tasked with the responsibility of considering numerous submissions from across Australia regarding the necessity and desirability of introducing a federal Human Rights Act and other possible options for increasing the recognition and protection of human rights. In its final report to the Attorney-General, the Committee made a number of recommendations which focused upon increasing the consideration of human rights by all arms of government.[44] In particular, the Committee recommended introducing a mechanism to enable the Parliament to scrutinise legislation to ensure its compatibility with Australia's human rights obligations.[45] This recommendation was similar to the mechanism which is already in place under the Australian Capital Territory's *Human Rights Act 2004* (ACT).[46]

The Committee further recommended the adoption of a federal Human Rights Act containing a number of mechanisms designed to ensure that human rights are taken into consideration at every stage of government decision-making.[47] In response to the Committee's recommendations, the Attorney-General launched 'Australia's Human Rights Framework', which is essentially a range of policy measures aimed at increasing the protection of human rights in Australia.[48] Included within these measures was the introduction of a Parliamentary

[44] National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009) <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report>.
[45] Ibid [Recommendation 6].
[46] *Human Rights Act 2004* (ACT) ss 37-39.
[47] National Human Rights Consultation Committee, above n 44.
[48] Attorney-General's Department, Australian Government, *Australia's Human Rights Framework* (2010) <http://www.ag.gov.au/humanrightsframework>.

Joint Committee on Human Rights, which was subsequently established in 2012. Since its establishment, each new bill and disallowable legislative instrument has been required to be accompanied by a statement of compatibility.[49] In the opinion of the Chair of the Committee, 'the requirement to produce a statement of compatibility is having tangible results'.[50] He argues that it 'is clear that government agencies and Ministers are gradually getting better at thinking about human rights impacts as part of the legislative process and this is starting to be reflected in the statements that come before the committee.'[51] However, despite these positive developments, some critics argue that the Committee's work 'will make little difference to the protection of human rights at the community level.'[52]

Professor George Williams argues that, in fact, it 'will even more starkly demonstrate how self-regulation by politicians, when it comes to human rights, is the problem, and not the solution'.[53] Arguably, the requirement to produce statements of compatibility strikes a politically acceptable balance which increases human rights awareness and accountability, without posing a serious challenge to the well-entrenched tradition of parliamentary sovereignty. In the words of former High Court judge, The Hon Michael Kirby:

> In part, it is simply the crude fact that those who presently enjoy power in a society such as Australia (politicians and media) are reluctant to surrender any part of that power lest that surrender later come back to bite them in the form of a court proceeding that declares the need for a response in respect of their conduct that breaches or ignores universal human rights.'[54]

Williams and Burton argue that 'the likelihood that Australia's exclusive parliamentary model will produce strong and effective human rights protection is low'.[55] Whilst they identify various factors contributing to the weakness of the approach, they argue that the most 'basic

[49] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), ss 8-9.
[50] Harry Jenkins, *Human Rights Compatibility: Parliamentary Scrutiny and Human Rights in Australia* (Speech delivered by Harry Jenkins, NSW Bar Association Human Rights Committee Professional Development Seminar, 28 February 2013) 8 <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/~/media/Committees/Senate/committee/humanrights_ctte/statements/2013/pdf/NSW_Bar_Assocn_HumanRightsCommittee_seminar_280213.ashx>.
[51] Ibid.
[52] George Williams cited in Michael Kirby, 'National Human Rights Framework Developments' (2010) 52 *Human Rights Law Resource Centre Bulletin* <www.hrlc.org.au/files/HRLRC-Bulletin-08.10.doc>.
[53] Ibid.
[54] Michael Kirby, 'Protecting Human Rights in Australia Without a Charter' (2011) 37 (2) *Commonwealth Law Bulletin* 255, 272.
[55] George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection' (2013) 34 (1) *Statute Law Review* 58, 94.

flaw' is the fact that the approach 'fails to provide any independent external check upon the work of Parliament'.[56] In other words, the absence of judicial contribution to the process 'removes one of the most important incentives for Parliament to comply…'[57]

Adopting the National Human Rights Consultation Committee's recommendation to introduce a federal Human Rights Act could help remedy this weakness, and improve human rights protection and accountability in Australia. However, the extent to which it could do so is largely dependent on the model adopted. The Committee discussed the adoption of the 'dialogue' model, which is currently in operation in New Zealand, the United Kingdom and in the two state/territory jurisdictions in Australia which have adopted human rights charters (ACT and VIC). The dialogue model involves all three arms of government engaging in a 'dialogue', with each assigned particular roles in the process of debating human rights recognition and protection.[58] The executive arm of government 'is required to act in a manner consistent with human rights in its decision making and can face court action if it fails to do so'.[59] Ideally, this requirement helps lead to the creation of a human rights culture within government administration, operating to prevent human rights breaches. The legislature is not bound in this way, as it has the ability to pass legislation which has been identified as inconsistent with human rights.[60] This reflects the current system in Australia, whereby the Commonwealth Parliament is able to pass legislation which has been identified as incompatible with human rights by the Parliamentary Joint Committee on Human Rights. However, unlike the current system, under a dialogue model the judiciary would be empowered to make declarations of incompatibility. Although the Parliament retains the ability to maintain the law in its incompatible form, it adds a further 'check' on legislative action.

Accordingly, if the dialogue model is adopted, it would still be possible for legislation which is incompatible with human rights protected under a Bill of Rights to continue to operate. As the legislature maintains the 'final say', even if the court issues a declaration of incompatibility, it is open to the political arms of government to ignore this declaration and

[56] Ibid.
[57] Ibid.
[58] National Human Rights Consultation Committee, above n 44.
[59] Ibid.
[60] Ibid.

maintain the operation of the law in question.[61] Whether this is viewed as problematic or positive for human rights protection, is dependent on the perceived appropriate roles for the respective arms of government. As discussed in the previous chapter, some of the strongest criticisms against the adoption of a constitutionally entrenched bill of rights are based on opposition to the perceived inappropriate extension of judicial power, as it enables the judiciary to invalidate democratically enacted laws on the basis of human rights considerations.

However, even under a dialogue model, a bill of rights could give the judiciary significant power, both in terms of judicial interpretation of the law, and the granting of remedies for human rights breaches by the executive. For example, section 32 (1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) states that, '[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.' The *2013 Report on the Operation of the Charter of Human Rights and Responsibilities* released by the Victorian Equal Opportunity and Human Rights Commission documents the various ways in which Victorian courts and tribunals have utilised charter rights in their interpretation of the state's laws.[62] It explains that in various cases, the existence of the Charter has impacted on the eventual outcome of the case.[63]

Accordingly, the potential impact of a federal statutory bill of rights on both human rights protection and the respective roles of the arms of government should not be underestimated. Accordingly, recognition of the HRTHE under a statutory bill of rights based on the dialogue model could offer an effective means of protecting the right. It would also possess the benefit of recognising the right within the context of broader human rights recognition, which would be appropriate given the interdependent nature of human rights.

[61] Additionally, a bill of rights may provide for express 'override declarations' in legislation, as per the provision contained under s 31 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[62] Victorian Equal Opportunity & Human Rights Commission, *2013 Report on the Operation of the Charter of Human Rights and Responsibilities* (2013) <http://www.humanrightscommission.vic.gov.au/index.php/our-resources-and-publications/charter-reports/item/844-2013-report-on-the-operation-of-the-charter-of-human-rights-and-responsibilities>.
[63] Ibid 54.

7.3.2 Option Seven: Implied recognition of the right under a federal statutory bill of rights

Recognising the right as a derivative right under a federal statutory bill of rights would face the same challenges and criticisms raised in response to the introduction of a bill of rights more generally. However, unlike express recognition of an individual right, recognising the right as a derivative right of other more established human rights, would be potentially easier to pass into law. Rather than attempting to achieve recognition of the HRTHE in the context of a broader bill of rights, the right could be recognised as an implied right by virtue of the express recognition of other more established ESC rights, such as the rights to health and an adequate standard of living. Despite this benefit, recognition of the right as a derivative right may be problematic for a number of reasons. Primarily, there is no guarantee that the Court would interpret other rights (or combinations thereof) as creating an implied right to a healthy environment. Accordingly, the very existence of the right would be at the discretion of the judiciary. This is a fragile basis for recognition, which would render the right's existence and expression subject to judicial interpretation. Accordingly, whilst it may be easier to advocate for express recognition of more established ESC rights from which the right may be implied, it is not the most preferable form of recognition in light of its inherent instability.

7.3.3 Option Eight: Express recognition of the right under specific Commonwealth human right to a healthy environment legislation

Recognising the right as an independent right under specific human right to a healthy environment legislation avoids the issues posed by recognition as a derivative right, and the challenges involved in securing recognition of a comprehensive statutory bill of rights. Moreover, it would be consistent with the general trend at the federal level towards recognition of human rights in specific legislation.[64] Despite these benefits, an independent right recognised under specific legislation would not be informed by the interrelated and interdependent ESC rights recognised under the ICESCR. Arguably, it is preferable for the right to a healthy environment to be recognised within this broader context, rather than as an isolated right. Recognising the right within the context of other ESC and CP rights respects and upholds the nature of human rights as fundamentally and inextricably 'interrelated,

[64] For example, s 3 (a) of the *Sex Discrimination Act 1984* (Cth) explains that one of the objects of the Act is to 'give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women and to provisions of other relevant international instruments.'

interdependent and indivisible'.[65] Whilst certain CP rights recognised at the international level have been implemented domestically under specific legislation, arguably these rights are more suitable for isolated recognition. In contrast, the HRTHE is fundamentally related to the rights to life, food, water, health, property, and an adequate standard of living. Accordingly, any recognition option that does not allow for the right to operate within this broader context would not be ideal.

Moreover, it is unlikely that if the legislature was willing to recognise a relatively politically contentious and emerging right such as the HRTHE, that it would be unwilling to recognise a bill of rights recognising more established rights.

[65] United Nations Human Rights Office of the High Commissioner, *What Are Human Rights?* (2015) <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>.

7.4 State and territory legislative power

In order to consider the options for legislative recognition of the right at the state/territory level, it is first necessary to determine whether the state/territory legislatures have legislative power to pass legislation recognising the human right to a healthy environment. The states have plenary legislative power, meaning that they are able to legislate with respect to any matters which do not fall within exclusive Commonwealth legislative power.[66] However, their legislative power is also limited by the operation of s 109 of the *Commonwealth Constitution*, which enables the court to invalidate state legislation to the extent of any inconsistency with Commonwealth legislation. Accordingly, the states do have legislative power to legislate with respect to the human right to a healthy environment under their general legislative power. However, the valid operation of any such legislation would be contingent upon its consistency with Commonwealth legislation. Moreover, the application of the legislation would be restricted to state laws, as it could not impact on the operation of Commonwealth laws, or the laws of other states.

The territories are also likely to possess the requisite legislative power to recognise the right. Both of the main territory jurisdictions, the ACT and the NT, have been granted self-government by the Commonwealth. However, the *Constitution* only permits the Commonwealth to confer upon the territories the same legislative powers enjoyed by the Commonwealth (with some exceptions).[67] Under the Commonwealth legislation granting the Northern Territory self-government, the Legislative Assembly of the NT has been given legislative power to 'make laws for the peace, order and good government of the Territory', subject to the Act.[68] Similarly, under the legislation creating self-government for the ACT, the ACT Legislative Assembly has 'power to make laws for the peace, order and good government of the Territory'.[69]

This legislative power is subject to various limitations relating to Commonwealth legislative power, inconsistency rules and jurisdictional reach. Unlike legislation passed by state

[66] Patrick Keyzer, *Constitutional Law* (LexisNexis Butterworths, 2nd ed, 2005) 78.
[67] Anne Twomey, 'Inconsistency Between Commonwealth and Territory Laws' (2014) 42 (3) *Federal Law Review* 421, 424.
[68] *Northern Territory (Self-Government) Act 1978* (Cth), s 6.
[69] *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 22 (1).

parliaments, legislation passed by territory parliaments is subject to amendment and invalidation by the Commonwealth. The Commonwealth is also able to amend the scope of territory legislative power.[70] Given the scope and nature of the territories legislative power, it is likely that both the ACT and the NT would be able to pass legislation recognising the HRTHE. The ACT has already exercised this legislative power by passing human rights legislation, and it would be possible for an ESC right such as the HRTHE to be incorporated within the Act.[71]

[70] For an example of the exercise of the Commonwealth's power to limit the scope of territory legislative power, see: *Euthanasia Laws Act 1997* (Cth).
[71] See Australian Capital Territory Economic, Social and Cultural Rights Research Project, *Australian Capital Territory Economic, Social and Cultural Rights Research Project Report* (2010) 58 <http://regnet.anu.edu.au/sites/default/files/uploads/2015-05/ACTESCR_project_final_report.pdf>.

7.5 Options for state and territory legislative recognition

As mentioned above, there are three main options for legislative recognition of the human right to a healthy environment at the state/territory level. Namely, recognition as an independent right under a statutory bill of rights, recognition as a derivative right under a statutory bill of rights, or recognition as an independent right under specific legislation.

7.5.1 Option Nine: Express recognition of the right under state/territory bill of rights legislation

Five of Australia's states and all of its territories (bar the ACT) have not enacted a statutory bill of rights. Only one state (Victoria) has already legislated to recognise a charter of rights, the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

The Charter's purposes are stated under the Act:

> The main purpose of this Charter is to protect and promote human rights by—
>
> (a) setting out the human rights that Parliament specifically seeks to protect and promote; and
>
> (b) ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights; and
>
> (c) imposing an obligation on all public authorities to act in a way that is compatible with human rights; and
>
> (d) requiring statements of compatibility with human rights to be prepared in respect of all Bills introduced into Parliament and enabling the Scrutiny of Acts and Regulations Committee to report on such compatibility; and
>
> (e) conferring jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted consistently with a human right and requiring the relevant Minister to respond to that declaration.[72]

As can be seen from the legislation's purposes, the Charter is based on the dialogue model discussed earlier. It does not grant courts the power to invalidate legislation on human rights grounds. However, it does require that the courts interpret legislation compatibly with human rights, and confers upon them the power to make a declaration of inconsistent interpretation. The Australian Capital Territory (ACT) has introduced similar human rights legislation, in the form of the *Human Rights Act* 2004 (ACT). Both pieces of legislation concentrate on civil and political rights, with the exception of the right to education recognised under the ACT legislation. In a review of the Victorian Charter by the Victorian Scrutiny of Acts and Regulations Committee (SARC), the SARC did not support the Law Institute of Victoria's submission to include social and economic rights in the Charter.[73] Similarly, the ACT

[72] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 2.

[73] Scrutiny of Acts and Regulations Committee (Vic), *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 52

Economic, Social and Cultural Rights Research Project released a report in 2010 which recommended in favour of the inclusion of ESC rights guarantees in the *Human Rights Act 2004* (ACT), on the grounds that it would be both 'desirable and feasible'.[74] Apart from the one ESC right referred to above, there has been no reform on this front. Accordingly, recognition of the human right to a healthy environment would represent a significant departure from the status quo, as it is not only an economic, social and cultural right, but it is also a less well accepted emerging right at the international level.

The introduction of state bills of rights has been discussed in other jurisdictions. Notably, in Tasmania, the Tasmania Law Reform Institute (TLRI) released a report in 2007 titled, *A Charter of Rights for Tasmania* which recommended the adoption of a Tasmanian Charter.[75] However, despite a large degree of public support for a Charter, and strong public opinion that human rights are inadequately protected in the state (95% of submissions received),[76] Tasmania is yet to enact a comprehensive bill of rights.[77] Similar levels of public support, academic debate and political inaction have been experienced in other state jurisdictions. Despite this, achieving the enactment of state/territory bills of rights seems unlikely at present. However, it remains one of the most preferable forms of recognition, as it would situate recognition of the HRTHE within the context of the recognition of other ESC rights.

7.5.2 Option Ten: Implied recognition of the right under state/territory bill of rights legislation

As discussed in Chapter Four, there are various human rights from which the human right to a healthy environment may be implied, including the rights to health and an adequate standard of living. As both of the existing rights charters at the state/territory level do not include ESC rights (with the exception of the right to education under the ACT legislation), under current

<http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/report_response/20110914_sarc.charterreviewreport.pdf>.

[74] ACT Economic, Social and Cultural Rights Research Project, *ACT Economic, Social and Cultural Rights Research Project Report* (2010), 11 < http://acthra.anu.edu.au/documents/ACTESCR_project_final_report.pdf>.

[75] Tasmania Law Reform Institute, *A Charter of Rights for Tasmania* (2007) <http://www.utas.edu.au/__data/assets/pdf_file/0003/283728/Human_Rights_A4_Final_10_Oct_2007_revised.pdf>.

[76] Ibid 20.

[77] However, in 2010, the Tasmanian State Government initiated a Human Rights Charter consultation process, seeking community views on the possible introduction of a Charter. No reform has followed as a result.

law any implication of the human right to a healthy environment would have to be made upon the basis of civil and political rights.[78] The most relevant right under the Victorian Charter is the 'right to life' recognised under s 9. It has been suggested that the right to water could be interpreted as falling within the scope of the right to life protected under the Charter.[79] Accordingly, it is perhaps possible that the HRTHE could be similarly implied. However, this interpretation seems unlikely given the focus and scope of the right to life under the Charter, which is based on the ICCPR formulation of the right. The scope of the right has been interpreted relatively narrowly at the state level in Victoria and at the international level. Interpretation has focussed principally on the continuance of human life (for example, protection against arbitrary killing), and the protection of bodily integrity.[80] Whilst it may be possible to interpret the right as having a broader scope (which could extend to the conditions necessary to realise the right, such as a healthy environment), such a broad interpretation is unlikely given the current focus of right to life case law and jurisprudence. Moreover, as noted by Cantley-Smith, 'an immediate limitation on such an approach is the fact that such action clearly requires the existence of an appropriate case/s'.[81] She observes that:

> Given the current paucity of human rights cases, it may be necessary for environmental and/or human rights advocates and NGOs to consider running a test case in Australian courts, as a way of getting recognition of a human right to a healthy environment.[82]

This highlights the problematic nature of relying upon judicial interpretation of other rights to achieve recognition of the human right to a healthy environment. Achieving confirmation of its very existence is contingent upon finding the right case and the right judge. Even if it is recognised, discussion as to its scope must necessarily take place within the context of the scope of other rights. For example, rather than asking what recognition of the right to a healthy environment requires, the court would be required to ask what recognition of the right to life or property or health requires and how protection of the natural environment furthers their fulfilment. Accordingly, for the same reasons listed above in the Commonwealth context,

[78] It is likely that if charters were introduced in the other state/territory jurisdictions, they would also exclude ESC rights.
[79] Magdalena McGuire, 'South African Constitutional Court Considers the Right to Sufficient Water and a Dignified Life' (2009) <http://hrlc.org.au/city-of-johannesburg-and-others-v-mazibuko-and-others-48908-2009-zasca-20-25-march-2009/>
[80] Victorian Equal Opportunity & Human Rights Commission, 'Section 9 – Right to Life Fact Sheet' (2013) <http://www.humanrightscommission.vic.gov.au/media/k2/attachments/Charter_FS_IND_SECT_9.pdf>
[81] Cantley-Smith, Rowena, 'A Human Right to a Healthy Environment' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters, 2013) 447, 473.
[82] Ibid.

implied recognition of the right at the state/territory level would not constitute the most preferable recognition option.

7.5.3 Option Eleven: Express recognition of the right under specific state/territory human right to a healthy environment legislation

Recognising the right as an independent right under specific human right to a healthy environment legislation is less ambitious than attempting to pass state/territory charters where they do not already exist, or to introduce ESC rights into existing charters. However, arguably it makes little sense for state legislatures to pass specific legislation on the right in the absence of the express recognition of other more established human rights. Moreover, in jurisdictions which already contain rights charters, the introduction of specific right to a healthy environment legislation might seem incongruous in a system where proposals to include ESC rights into the charters have been rejected.

7.6 Preferable form of legislative recognition

At the Commonwealth level, arguably the most preferable form of legislative recognition is recognition of an independent human right to a healthy environment in a statutory bill of rights. Although this is an ambitious recognition option, it would provide the most comprehensive recognition of the right, within the context of recognition of other human rights. The other potential options for Commonwealth recognition are limited for various reasons. Implied recognition renders the existence and interpretation of the right at the mercy of the judiciary, whilst express recognition under specific HRTHE legislation would force the right to operate in isolation from other ESC rights. At the state/territory level, for the same reasons, introducing the right into existing and proposed state/territory rights charters is arguably the most preferable form of legislative recognition.

Although relying upon recognition by derivation from other rights is perhaps the most politically feasible option at present, express recognition of an independent right at both levels of government is preferable as it is bypasses the problematic aspects of implied recognition and provides stronger protection for the right. It is however acknowledged that any form of legislative recognition of a bill of rights generally, or the HRTHE specifically, is unlikely to occur in the near future.

In terms of the appropriate model for recognition, it has been argued that the preferable model for the proposed charters of rights is implementation of the dialogue model. This is for two main reasons. Firstly, the dialogue model represents a political compromise between increasing human rights protection, whilst maintaining parliamentary supremacy. It is unlikely that any greater incursion on the scope of governmental power would receive support, in light of the history of political reluctance in this regard. Secondly, the dialogue model has already been successfully adopted in two Australian jurisdictions. Accordingly, there is precedent for the effective operation of this model in the Australian context.

7.7 Potential benefits of legislative recognition of the human right to a healthy environment for environmental protection in Australia

If the proposed forms of legislative recognition were adopted, they would have various impacts on government decision-making processes in Australia which could be characterised as beneficial for environmental protection. Firstly, during the legislative process, proposed legislation would be scrutinised for consistency with the right, through the issuing of statements of compatibility. This could proactively prevent the introduction of legislation which jeopardises the government's ability to protect, respect and fulfil the right. Secondly, it could require all public authorities to act in a way that is compatible with the right. This could have implications for the actions of key government agencies involved in environmental management. Thirdly, it could ensure that the court interpreted legislation in a manner which was compatible with the right, and in instances where such an interpretation was not possible, they could issue a declaration of inconsistent interpretation. This would encourage a dialogue between the legislature, executive and the judiciary on the legislation's impact on the right.

As the right would be considered during the creation, implementation and interpretation of legislation, the government would be better able to prevent and respond to breaches of the right. This safety net of protection would not suffice to address all potential and actual breaches of the right, or even guarantee its fulfilment. However, it would ensure that the right enters the legal and policy discourse on issues which consider natural resource management and sustainable development. In particular, couching sustainability concerns in the language of human rights may further enable principled scrutiny of proposed legislation, to the benefit of improved environmental protection. Any impacts not caught at that stage, could be addressed through the dialogue created by the obligations imposed on the executive, and the jurisdiction conferred on the judiciary to take into consideration human rights considerations in their decision-making processes. Having awareness of the obligation to respect the right in their actions, could have implications for how members of the executive make crucial decisions which impact on the natural environment. The practical impact of the Victorian Charter in this regard, is testament to the legal, policy, and political changes which can be effectuated by the introduction of a charter of rights. As experience with the Charter has demonstrated, where existing laws and regulations fail to adequately protect the object of a human right (for example, women, children, people with disabilities, etc…), the relatively

broad scope and application of human rights guarantees can operate to address gaps in the legal regime. In an environmental law landscape characterised by complexity and procedural specificity, it is possible that the right could be utilised as a tool to address the broader implications of actions, in instances where recourse to traditional legal mechanisms offer little remedy.

The following section considers the extent to which the potential benefits for environmental protection associated with domestic legal recognition identified in Chapter Five could be realised through the proposed form of legislative recognition. Although comprehensive exploration of these potential consequences is beyond the scope of the thesis, this section aims to explore possible ways in which legislative recognition of the HRTHE may realise the potential benefits identified. The case study of water resources management has been utilised throughout to further elucidate the possible operation of the right in this regard.

7.7.1 Emphasis on the fundamental importance of the interrelationship between human health and wellbeing and the state of the natural environment

It is possible that formal legislative recognition of the right would encourage further emphasis on the fundamental importance of the interrelationship between human health and wellbeing and the state of the natural environment. By scrutinising legislation impacting on the relationship between human health and the state of the natural environment for compatibility with the HRTHE, the issue would be raised as a matter for parliamentary debate. This could possibly result in more explicit legislative recognition of the linkage between human health/wellbeing and environmental protection. For example, it could lead to recognition of the linkage in the preamble of legislation, which could have an impact on later interpretation and application of the legislation. The HRTHE is already considered during the legislative process to an extent at the federal level, due to the Parliamentary Joint Committee on Human Right's recognition of the right's incorporation through the right to health under the ICESCR. However, legislative recognition in state/territory bills of rights would ensure that the right is also considered in the development of state/territory legislation. Mandating consideration of the right during the legislative process could encourage a more consistent and considered understanding of the interrelationship between human health and the health of the natural environment. Improving this understanding could prove to be beneficial for environmental

protection as failure to recognise interdependencies between nature and humankind can undermine the effectiveness of environmental protection laws and policies.

Given that human beings are dependent on water for their survival, recognition of this linkage is particularly crucial in the water resources management context. Water management legislation at the Commonwealth and state/territory levels already recognises the linkage to an extent. For example, the *Water Act 2007* (Cth) requires the Basin Plan to be prepared having regard to the 'critical human water needs' of Basin communities.[83] However, outlining the importance of the relationship in the proposed human rights charters would ensure that all introduced legislation would be considered for compatibility with the right. This does not occur at present,[84] even in jurisdictions where human rights charters are in operation. For instance, at the state/territory level, the two jurisdictions (ACT and VIC) with rights charters are already involved in scrutinising legislation for compatibility with human rights.[85]

However, as the legislation does not recognise ESC rights (with the exception of the right to education in the ACT legislation), the Victorian and ACT Parliaments do not scrutinise legislation for compatibility with the HRTHE or any of the rights from which it may be derived (such as, the right to health). Accordingly, in 2014 when the Victorian government presented a bill to reform the state's principal water resources management legislation, the HRTHE was not considered in the compatibility statement accompanying the bill.[86] If the HRTHE was recognised in the Victorian Charter, proposals to reform the state's water resources management regime would need to be assessed for compatibility with the right. Arguably, this requirement would encourage greater emphasis on the importance of the relationship between human and environmental health, which could be viewed as constituting a benefit for environmental protection. Accordingly, as can be seen, legislative recognition of the HRTHE may help to emphasise the interrelationship between human and environmental health through requiring consideration of the HRTHE in executive, legislative and judicial decision-making.

[83] *Water Act 2007* (Cth), s 86A.
[84] With the exception of limited consideration by the federal Parliamentary Joint Committee on Human Rights discussed below.
[85] *Charter of Human Rights and Responsibilities Act 2006* (VIC), s 28; *Human Rights Act 2004* (ACT) s 37.
[86] Water Bill 2014 (Vic).

7.7.2 Stronger basis for environmental laws and policies

According to Boyd, one of the key advantages of a constitutional HRTHE is its positive influence on the development and application of environmental laws.[87] Whilst recognising the HRTHE in statutory bills of rights would not act as a source of additional legislative power, it could operate to provide a stronger basis for environmental laws and policies where the necessity of such measures are challenged in light of competing priorities and interests. For example, a parliamentarian bringing forward proposed legislation could argue that the legislation helps to achieve realisation of the HRTHE. Similarly, government ministers could justify policies designed to improve environmental protection on the same grounds. Adding this human rights dimension to calls for increased/improved environmental protection could strengthen the likelihood of garnering support for proposed laws and policies. As discussed earlier in Chapter Three, employing 'rights talk' can help to elevate the status of an issue by utilising the powerful connotations associated with the language of rights.

Accordingly, the proposed form of legislative recognition could operate to provide a stronger basis for environmental laws and policies where the necessity of such measures are challenged in light of competing priorities and interests. Earlier in Chapter Two in the case study context of water management, it was explained that a limited 'water trigger' was introduced into the EPBC Act in order to enable Commonwealth approval and assessment of impacts of proposed coal seam gas and large coal mining developments on water resources. The necessity of Commonwealth oversight in this area was questioned by the Coalition Government, who sought to amend the EPBC Act to allow for the states/territories to be accredited for approval decisions in relation to large coal mining and coal seam gas developments likely to have a significant impact on a water resource.[88] The water trigger is currently the only MNES which must be assessed and approved by the Commonwealth only.[89] An Independent Review into the operation of the trigger is currently being conducted in order to evaluate the

[87] Boyd, above n 2, 233-235.
[88] Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014 (Cth). Originally, the government proposed devolving responsibility to state/territory governments through the use of bilateral agreements. However, in response to significant concern, the government put forward amendments which alter the proposed provisions in order to maintain the Commonwealth's role in relation to the water trigger: See, Commonwealth, *Parliamentary Debates*, Senate, 14 September 2015 (Simon Birmingham).
[89] Chris McGrath, 'Coalition's Environmental One-Stop Shop is Falling Apart' (2014) *The Conversation* <https://theconversation.com/coalitions-environmental-one-stop-shop-is-falling-apart-30965>.

appropriateness and effectiveness of the reform.[90] If the HRTHE had been recognised, it is possible that it could have been utilised to strengthen arguments for the retention of the trigger, on the grounds that the trigger seeks to ensure Commonwealth regulation of an issue that poses a significant threat to the health of a crucial national environmental resource necessary for the maintenance of human life and a healthy environment (water). Accordingly, whilst unlike constitutional recognition of the right, legislative recognition of the HRTHE would not be capable of strengthening environmental laws and policies through the prospect of judicial invalidation, or through the modification of legislative power, it could strengthen laws and policies through its impacts on the government decision-making process.

7.7.3 Increased prioritisation of environmental protection considerations in government decision-making

One of the key challenges facing environmental protection efforts in Australia, is the issue of how to balance competing economic, social and environmental interests. Under the dialogue model proposed, members of the executive/administration would have to take the HRTHE into consideration in the exercise of their powers. For example, this might mean that in determining whether to cancel or grant a licence, or whether to approve an environmental plan, or an environmental impact assessment, government decision-makers would need to consider the compatibility of their decisions with the HRTHE. Failure to do so could constitute grounds for judicial review. It is possible that this increased consideration of environmental protection considerations could lead to their increased *prioritisation* in government decision-making. This could also be the case in regards to consideration of the right during the legislative process, and subsequent interpretation of legislation by the courts. If the right is expressly considered during parliamentary debate and stated to be one of the motivations for enacting particular legislation, reference could be made to those statements during the process of statutory interpretation by the courts. This could have a particularly significant impact where legislation provides for the exercise of a discretion involving the balancing of competing economic, social and environmental considerations. In order to ascertain the 'purpose' of the legislation, judges could consult the second reading speeches introducing the legislation into parliament to determine how parliament intended the competing factors to be prioritised. Given the HRTHE's focus on maintaining the health of

[90] Department of the Environment (Cth), 'Independent Review of the 2013 EPBC Act Amendment – Water Trigger' (2016) <https://www.environment.gov.au/epbc/what-is-protected/water-resources/review>.

the natural environment at present and into the future, if legislation has as its purpose the realisation of the right, it could operate in favour of an interpretation of the legislation which prioritises environmental protection.

One of the key reforms associated with the introduction of bills of rights adopting the dialogue model, is the requirement of scrutiny of proposed legislation for consistency with human rights. This already exists to an extent at the federal level, by virtue of the introduction of the Parliamentary Joint Committee on Human Rights which is dedicated to examining federal legislation for compatibility with human rights. The legislation which established the Committee created a requirement that each new Bill introduced into Parliament must be accompanied by a statement of compatibility outlining the compatibility of the Bill with human rights.[91] It must be noted however that the Act specifically states that failure to comply with this requirement 'does not affect the validity, operation or enforcement of the Act or any other provision of a law of the Commonwealth'.[92]

In other words, whilst the Committee has the power to highlight and examine compatibility with human rights standards, it does not have the power to mandate modifications by Parliament in order to reconcile identified incompatibilities. Although the Committee has considered the human right to a healthy environment during its scrutiny process,[93] it has failed to consider the right in instances where arguably the right was engaged by the proposed legislation. This was demonstrated recently when the Committee considered a Bill seeking to amend the *Water Act 2007* (Cth), by *inter alia* imposing 'a statutory limit of 1500 gigalitres on Commonwealth purchases of surface water across the Murray-Darling Basin'.[94] The Bill was accompanied by a statement of compatibility, in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

The statement of compatibility identifies that the Bill engaged the right to an adequate standard of living, and the right to health.[95] As discussed earlier in Chapter Four, the right to

[91] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s 8.
[92] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s 8 (5).
[93] Parliamentary Joint Committee on Human Rights, *Twenty-Seventh Report of the 44th Parliament* (2015) 4 [1.19].
[94] Explanatory Memorandum, Water Amendment Bill 2015 (Cth), 1.
[95] Ibid [13].

a healthy environment can be derived by implication from these rights. Whilst the statement does not acknowledge the HRTHE, it does acknowledge the related implied right to water (recognised by the UNCESCR).[96] The statement concluded that the proposed amendments to the *Water Act 2007* (Cth) contained in the Bill will 'continue to support the human right to water'.[97] It emphasised that consideration of the Bill's compatibility with human rights standards, must take into account the 'overall framework' of the legislation, which the statement argued 'supports access to sufficient, safe, acceptable and physically accessible water for personal and domestic uses'.[98] The Committee considered the Bill, and concluded that the Bill did not 'require additional comment' as it either did 'not engage human rights' or engaged rights but did 'not promote or limit rights'.[99]

If a federal bill of rights was introduced, the mandate of the Committee would necessarily need to be altered to include consideration of the rights recognised under the legislation. At present, the Committee is limited to consideration of rights recognised under specified international instruments (including the ICCPR and the ICESCR).[100] Accordingly, by recognising the HRTHE in the bill of rights, the Committee would be required to consider the right when scrutinising relevant legislation, such as the Water Amendment Bill 2015 (Cth). Although it was recognised earlier that the Committee has considered the HRTHE during its scrutiny process, recognition of the HRTHE in a federal bill of rights might clarify the content and therefore relevance and application of the right. It is therefore useful to consider whether consideration of the HRTHE may have impacted on the Committee's ultimate conclusion that the proposed amendments would not limit rights. In other words, whether consideration of the HRTHE may have influenced the Committee to conclude that the Bill did limit a right.

The Bill was introduced by the Federal Government, as a means of delivering on its commitment to place a cap on water purchases in the MDB.[101] In their dissenting report to the Senate Environment and Communications Legislation Committee, The Australian Greens

[96] Ibid.
[97] Ibid [15].
[98] Ibid [14].
[99] Parliamentary Joint Committee on Human Rights, *Twenty-Third Report of the 44th Parliament* (2015) 1 [1.7].
[100] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s 3.
[101] Greg Hunt, Barnaby Joyce and Bob Baldwin, 'Bill to Cap Water Buyback to 1500GL Introduced to Parliament' (Media Release, 28 May 2015) <http://www.environment.gov.au/minister/hunt/2015/mr20150528.html>.

objected to the Bill on the grounds that it 'undermines the very Act it seeks to amend by overriding the Commonwealth's obligations to achieve the Sustainable Diversion Limits mandated in the Murray-Darling Basin Plan by limiting how much water it may buy back from willing sellers'.[102] Various other groups and organisations supported this position, and argued against the adoption of the amendments.[103] However, the reform was supported by the NSW Irrigators Council who argued that the cap would help minimise what they view as the 'damaging economic impacts' of the Basin Plan.[104]

Accordingly, the cap can be viewed as a form of compromise between the competing water users of the MDB (such as, irrigators, residents, and the environment). The rights considered in the statement of compatibility were the rights to health, an adequate standard of living and the right to water. If the HRTHE had also been considered, it may have encouraged greater consideration or prioritisation of environmental protection factors over social and economic concerns. Prioritising environmental protection may have operated against the adoption of a 'cap' and towards the adoption of a flexible target (i.e. enabling the Commonwealth to purchase/buyback more water for the environment). Accordingly, it is possible that consideration of the HRTHE could have assisted in the prioritisation of environmental protection considerations.

Another way that legislative recognition of the HRTHE may operate to increase the prioritisation of environmental considerations in government decision-making is by providing a justification for necessary encroachments on private property rights. In the Australian Law Reform Commission's Interim Report exploring encroachments by Commonwealth legislation on traditional rights and freedoms, the Commission considered possible encroachments on property rights by Commonwealth environmental laws.[105] The Commission

[102] Australian Greens, 'Dissenting Report' (2015) *Senate Environment and Communications Legislation Committee Water Amendment Bill 2015 [Provisions] Report* [1.3] <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Water_Amendment_Bill_2015/Report>.
[103] Bill McCormick and Sophie Power, 'Water Amendment Bill 2015' (2015) Bills Digest no. 20 2015-16 <http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1516a/16bd020#_Toc429473129>.
[104] Mark McKenzie cited in Michael Condon, 'NSW Irrigators Get Anxious About Legislation to Limit the Water Cap', *ABC News* (online), 23 March 2015 < http://www.abc.net.au/news/2015-03-20/nrn-nsw-irrigators-get-anxious-about-cap/6335802>.
[105] Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (ALRC Interim Report 127)* (2015) [8.48] <https://www.alrc.gov.au/publications/alrc127>.

noted that various Commonwealth environmental laws could 'be seen as interfering with real property rights'.[106]

They listed a number of examples, including the 'regulation of land use, development and activities', and 'restrictions on the assignment/sale of tradeable resource-use property rights'.[107] In particular, the EPBC Act was raised as a specific concern. The Commission explained that the EPBC Act's 'justification' for interference with property rights is the 'requirement for an action to have, or be likely to have, a 'significant' impact', as this requirement seeks to reach 'a balance between an owner's rights and the public interest'.[108] The National Farmer's Federation argued that the Act's interference with property rights 'may be unjustified' however, as it is 'having a significant financial impact on farmers as a consequence of the limitations it places on property development and land use change'.[109] It may be possible that recognition of the HRTHE could assist in further justifying legislative encroachment on private property rights, where interference is necessary for environmental protection. As noted earlier in Chapter Three, there may be certain benefits associated with the use of 'rights talk' where environmental protection interests have to compete with property interests.

One of the laws that was specifically referred to in the Interim Report was the operation of the *Water Act 2007* (Cth). The Commission noted that the National Farmer's Federation had submitted that the reduction in water access entitlements effected under the legislation when 'unaccompanied by compensation at market rates' constitutes an 'unjustifiable interference with property rights'.[110] Despite this claim, the Commission noted that the legislation has features which seek to 'address any unjustifiable interference with property rights', and accordingly that 'some might say that the operation of the *Water Act* does not amount to an unjustifiable interference with property rights'.[111] It is possible that legislative recognition of the HRTHE may assist in issues of this nature, as institutions such as the Commission would

[106] Ibid.
[107] Ibid.
[108] Ibid [8.54].
[109] Ibid [8.61].
[110] Ibid [8.93].
[111] Ibid.

be able to cite the right as a justification for government interference with private property rights in the broader interest of ensuring adequate environmental protection.

Further examples of instances where legislative recognition of the HRTHE may have assisted in justifying encroachments on private property interests are provided by the cases of *Arnold* and *ICM* (discussed earlier in Chapter Two).[112] Both of these cases involved challenges to water management legislation which sought to improve protection of water resources by limiting private property access rights to the resource. It was noted that the outcomes of these cases demonstrate that where legislation governing the management of water resources has a clear protective aim judges will interpret that legislation in accordance with Parliament's intention to prioritise the protection of the environment, even where doing so may result in negative social/economic consequences for individuals, or communities. In *ICM*, it was confirmed that if altering the nature of private rights to the resource is necessary to achieve sustainable management, then that falls within the scope of the government's power.

In the case of *Arnold*, the NSW Land and Environment Court was asked to review the lawfulness of a water sharing plan and an associated regulation made pursuant to the *Water Management Act 2000* (NSW) which reduced groundwater extraction entitlements. The Act contains a set of 'water management principles' which persons exercising functions under the Act must 'take all reasonable steps' to act in accordance with.[113] These principles require, inter alia, that 'the cumulative impacts of water management licences and approvals and other activities on water sources and their dependent ecosystems, should be considered and minimised', [114] that 'the social and economic benefits to the community should be maximised',[115] and in relation to water sharing, that 'sharing of water from a water source must protect the water source and its dependent ecosystems'.[116]

The judge refused to accept the submission put forward by the applicant that in making the Plan the Minister was 'under a duty to maximise the social and economic benefit to the

[112] *Arnold v Minister Administering the Water Management Act 2000 (No 6)* [2013] NSWLEC 73; *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140.
[113] *Water Management Act 2000* (NSW), s 9 (1) (a).
[114] *Water Management Act 2000* (NSW), s 5 (1) (d).
[115] *Water Management Act 2000* (NSW), s 5 (1) (g).
[116] *Water Management Act 2000* (NSW), s 5 (3) (a).

community'.[117] Rather, he was of the view that 'the Minister's obligation…is to take all reasonable steps to generally promote [the] principles as a whole'.[118] His honour found that the Minister had upheld this duty, by recognising that 'entitlements had to be reduced to ensure the sustainable long-term use of the resource'. [119] In interpreting the *Water Management Act 2000* (NSW), he noted that:[120]

> The concept of socio-economic impacts in the 2000 Act itself is very broad. Section 3(c) provides that one of the Act's objects is "to recognise and foster the significant social and economic benefits to the State that result from the sustainable and efficient use of water", including "benefits to the environment". Thus, the legislature has recognised that social and economic benefits may include environmental benefits. When considering the socio economic impacts of a proposed plan, the Minister is therefore entitled to consider that the environmental benefits may also have a positive socio-economic impact.

In *Arnold*, the Court's decision effectively supported the government's decision to prioritise environmental protection of the water resource in order to achieve the long term sustainability of the resource (which is ultimately in the interest of *all* users). Had the court decided differently (i.e. interpreted the duty as requiring the Minister to maximise the social/economic benefit) it would have impacted on the Government's ability to regulate the resource sustainably. The judge held that in making water sharing plans, the legislation required the Minister to 'give priority to protection of the water source', and to apply the principles of ecologically sustainable development.[121] This legislative mandate sufficiently justified the incursion on private property rights. Accordingly, it is difficult to see how recognition of the HRTHE could have significantly altered the ultimate decisions in either *ICM* or *Arnold*. Encroachments on private property rights in order to prioritise environmental protection were sufficiently justified utilising legislative intent to pursue sustainable management, and through the application of the principles of ESD. However, it is possible that in other instances recourse to the HRTHE would assist the court in determining how to justify limitations on property rights on environmental protection grounds. Accordingly, it can be seen that consideration of the HRTHE in executive, legislative and judicial decision-making could help to increase contemplation and prioritisation of environmental protection considerations.

[117] *Arnold v Minister Administering the Water Management Act 2000 (No 6)* [2013] NSWLEC 73 [207].
[118] Ibid.
[119] Ibid [216].
[120] Ibid [215].
[121] Ibid.

7.7.4 Safeguards against environmental protection rollbacks

One of the posited benefits of legal recognition of the HRTHE is protection against rollbacks on environmental protection, as the right could operate as a backstop to prevent governments from winding back environmental protection measures.[122] Such rollbacks could be characterised as failures to take reasonable steps towards progressive realisation of the right. This characterisation could assist in providing substance to arguments advocating for the retention of environmental protection measures which have proven effective. In the water management context, it could be argued that the removal of the National Water Commission constitutes a 'rollback' on environmental protection, as the Commission was fulfilling important functions in regards to the monitoring and assessment of Australia's key water reforms. In making the decision to remove the Commission, the Government did not consider the potential impact of its removal on the HRTHE. The statement of compatibility accompanying the legislation seeking to abolish the Commission in fact claimed that the Bill was compatible with human rights, as none of the rights and freedoms recognised in the relevant international instruments were engaged.[123] The Parliamentary Joint Committee on Human Rights considered the proposed legislation, and concurred with this conclusion.[124]

It is likely that had the HRTHE been considered, it would have been engaged by this proposed legislation, as eliminating the National Water Commission impacts on Australia's system for water management. Whilst the statement of compatibility characterised this as a 'machinery of government' reform which was allegedly therefore outside of the scope of human rights consideration,[125] it can be argued that this change in the 'machinery of government' is relevant to how Australia's water resources are managed and therefore impacts on the realisation of the HRTHE. The Commission performed independent advice, monitoring, audit and assessment functions.[126] Although most of these functions have been redirected to other agencies, there were arguably distinct advantages associated with the concentration of these functions in the NWC. As noted by one commentator, 'no government agency has the

[122] Boyd's research has demonstrated that this 'theoretical advantage' has been proven in practice in relation to constitutional recognition of the right: Boyd, above n 2, 236.
[123] Explanatory Memorandum, National Water Commission (Abolition) Bill 2014 (Cth), [14] – [17].
[124] Parliamentary Joint Committee on Human Rights, *Thirteenth Report of the 44th Parliament* (2014) 14 [1.43].
[125] Explanatory Memorandum, National Water Commission (Abolition) Bill 2014 (Cth), [16].
[126] National Water Commission, *Role and Functions* (2015) < http://www.nwc.gov.au/organisation/role>.

independence and the scope' enjoyed by the Commission.[127] Removing the Commission from the regulatory regime, creates gaps which have not been adequately addressed by the transferral of certain functions to other agencies. For instance, a number of key functions of the Commission in relation to the implementation of the National Water Initiative have not been transferred.[128] As noted by Stuart Khan, 'without the National Water Commission, there is no obvious responsible body to make an independent expert assessment' on adherence to the NWI principles when new government policies are announced.[129] Moreover, he argues that in the absence of the Commission, 'there is now no clear avenue through which to drive and harness the benefits from national coordination in water reform'.[130] Accordingly, whilst the abolition of the NWC may in form appear to be merely a 'machinery of government' change, it has substantive impacts on the regime for water management in Australia. Accordingly, it is of relevance to the realisation of the human right to a healthy environment, as it impacts on the way in which water resources are protected. However, it is not possible to accurately determine whether consideration of the HRTHE would have had any influence on the ultimate decision to pass the legislation and abolish the Commission.

Whilst it could possibly be argued that removal of the NWC weakens water resources monitoring and water policy review, it is not possible to state that recognition of the HRTHE requires the continued operation of institutions such as the NWC. The right simply establishes certain obligations, which the government is obliged to progressively realise according to means it considers appropriate. However, as legal recognition of the right would mean that proposed policy and legislative changes would have to be scrutinised for consistency with the right, it would certainly open up discussions about the implications of reforms for the realisation of the right. For instance, couching the removal of the NWC as a 'rollback' on a key aspect of Australia's fulfilment of the obligations imposed by the HRTHE would arguably have more suasion than simply couching its removal as a 'machinery of government' reform. In this regard, legislative recognition of the right could assist in providing substance to arguments advocating for the retention of environmental protection measures which have

[127] Kate Loynes, 'Who Watches the Waters? The End of the National Water Commission' (2014) *Flag Post* <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2014/May/NWC>.
[128] For a list of the Commission's statutory functions, see: *National Water Commission Act 2004* (Cth), s 7.
[129] Stuart Khan, 'Axing Water Overseer Could Leave Regional Australia High And Dry' (2014) *The Conversation* <http://theconversation.com/axing-water-overseer-could-leave-regional-australia-high-and-dry-33093>.
[130] Ibid.

proven effective. However, unlike constitutional recognition of the right, legislative recognition would not enable the judiciary to invalidate legislative or executive decision-making resulting in rollbacks on environmental protection, and it would not limit the scope of Commonwealth legislative power to prevent rollbacks.

7.7.5 Safety net by filling gaps in environmental legislation

The HRTHE could potentially operate to provide a safety net for environmental protection in instances where environmental protection and management legislation falls silent on how to resolve an ambiguity in the legislation, or fails to address a new environmental protection issue.[131] This could potentially be effected through the impacts of recognition on the judicial role with respect to statutory interpretation. One of the main aspects of the proposed form of legislative recognition of the right, is the introduction of provisions which guide the court's consideration of human rights in the interpretation of legislation.

Adoption of a federal statutory bill of rights based on the dialogue model would involve the inclusion of a provision addressing statutory interpretation. Division 3 of the Victorian Charter addresses interpretation of laws, and requires all statutory provisions to be interpreted in a way that is compatible with human rights (so far as it is possible to do so consistently with their purpose).[132] Additionally, in interpreting a statutory provision, the Charter enables judges to consider'[i]nternational law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right'.[133] It also empowers the Supreme Court of Victoria to make declarations of 'inconsistent interpretation' where it 'is of the opinion that a statutory provision cannot be interpreted consistently with a human right'.[134] Although the Minister is required to respond to declarations,[135] they do not affect the validity of the law.[136]

[131] Boyd, above n 2, 235.
[132] *Charter of Human Rights and Responsibilities Act 2006* (VIC), s 32 (1).
[133] *Charter of Human Rights and Responsibilities Act 2006* (VIC), s 32 (2).
[134] *Charter of Human Rights and Responsibilities Act 2006* (VIC), s 36 (2).
[135] *Charter of Human Rights and Responsibilities Act 2006* (VIC), s 37.
[136] *Charter of Human Rights and Responsibilities Act 2006* (VIC), s 36 (5) (a).

The nature and validity of ss 32 (interpretation provision) and 36 (declaration of inconsistent interpretation provision) of the Charter were considered in the High Court case of *Momcilovic v The Queen* (2011) 245 CLR 1 ('*Momcilovic*'). The case considered, *inter alia*, the constitutional validity of the Charter sections in question, in response to the Court of Appeal of the Supreme Court of Victoria issuing its first declaration of inconsistent interpretation. A majority of the Court held that the provisions were constitutionally valid, on various grounds. Whilst Chief Justice French concluded that s 32 was a 'valid rule of statutory interpretation',[137] Justice Heydon found that the provision was invalid, as in his view it 'commands the courts not to apply statutory provisions but to remake them — an act of legislation.'[138] Accordingly, he viewed the provision (and related sections) as inviting the Court to engage in an inappropriate interpretation process.

In regards to s 36, similar judicial divergence existed. French CJ concluded that declarations of inconsistent interpretation did 'not involve the exercise of a judicial function'.[139] However, he held that the 'making of the declaration does not affect the court's judicial function', and therefore it was 'consistent with the existing constitutional relationship between the court, the legislature and the Executive.'[140] In other words, the conferral of this non-judicial function on the Supreme Court of Victoria was not incompatible with the institutional integrity of the court. In fact, his Honour reasoned that '[b]y exemplifying the proper constitutional limits of the court's functions it serves to reinforce, rather than impair, the institutional integrity of the court'.[141] He stated that the declaration did 'no more than manifest, in a practical way, the constitutional limitations upon the court's role and the fact that it is Parliament's responsibility ultimately to determine whether the laws it enacts will be consistent or inconsistent with human rights'.[142]

In contrast, Justice Gummow viewed s 36 as constituting a 'novel regime' which did not 'withstand constitutional scrutiny'.[143] He argued that upholding the validity of s 36 would

[137] High Court of Australia, 'Momcilovic v The Queen & Ors [2011] HCA 34' (2011) 2 <http://www.hcourt.gov.au/assets/publications/judgment-summaries/2011/hca34-2011-09-08.pdf>.
[138] *Momcilovic v The Queen* [2011] 245 CLR 1 [450] (Heydon J).
[139] Ibid [89] (French CJ).
[140] Ibid [95] (French CJ).
[141] Ibid [97] (French CJ).
[142] Ibid [96] (French CJ).
[143] Ibid [172] (Gummow J).

create a 'significant change to the constitutional relationship between the arms of government with respect to the interpretation and application of statute law'.[144] He reasoned that it was analogous to the situation in the case of *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 where the court found that allowing a federal judge to provide the Executive with an 'advisory opinion upon a question of law…was incompatible with the holding of that office'.[145] His honour maintained that it was not appropriate for the court to be placed in a position 'to set in train a process whereby the executive branch of government may or may not decide to engage legislative processes to change existing legislation.'[146]

Reviewing the judicial discussions in *Momcilovic* serves to highlight the delicate line the court must walk in interpreting statutory provisions in compatibility with human rights standards. Under the dialogue model, and in consistency with the separation of powers, courts must be careful to remain strictly within the scope of their appropriate role. This would be particularly the case in relation to reading legislation in compatibility with the HRTHE, as it would inevitably involve consideration of contentious issues of interpretation. Experience with the ACT's *Human Rights Act 2004* (which contains a similar interpretation provision)[147] demonstrates that the judiciary has been relatively conservative in its application of the provision.[148] This is an understandable approach given fears regarding the possibility of the interpretation provision being utilised as a mechanism for judicial activism.[149] The first five year review of the operation of the ACT legislation revealed that the approach to the interpretation provision had not 'been conclusively considered by the ACT courts'.[150] However, at present the methodological approach adopted in the case of *R v Fearnside* appears to be the leading approach.[151]

[144] Ibid [183] (Gummow J).
[145] Ibid [183] (Gummow J).
[146] Ibid [184] (Gummow J).
[147] *Human Rights Act 2004* (ACT), s 30.
[148] Helen Watchirs and Gabrielle McKinnon, 'Five Years' Experience of the *Human Rights Act 2004* (ACT): Insights for Human Rights Protection in Australia' (2010) 33 (1) *UNSW Law Journal* 136, 146.
[149] Ibid 154.
[150] ACT Human Rights Act Research Project (ANU), *The Human Rights Act 2004 (ACT): The First Five Years of Operation* (2009) 55 <cdn.justice.act.gov.au/resources/uploads/JACS/ACT_Government_s_43_Review_Report.pdf>.
[151] *R v David Arthur Fearnside* [2009] ACTA 3 (24 February 2009).

The Human Rights Law Centre explains that the *Fearnside* approach requires the court to ask the following questions:[152]

1. Does the section to be interpreted enliven a human right;
2. If so, does the section constitute a reasonable limit on the human right;
3. If not, apply the interpretive principle.

To date, this interpretive approach has not been applied to an ESC right. Unlike the Victorian Charter (which contains no ESC rights), the ACT legislation contains one ESC right – the right to education.[153] The interpretive provision applies to this right, and accordingly there is precedent for the application of the provision to an ESC right. The possibility of recognising the HRTHE under the Act has been canvassed by the Australian Capital Territory Economic, Social and Cultural Rights Research Project.[154] Although it did not consider how the right's recognition might impact on the interpretation of existing legislation, it did note that the *Water Resources Act 2007* (ACT) and *Environmental Protection Act 1997* (ACT) protect the right to clean, potable water and the right to a healthy environment.[155]

In the case study context, water resources legislation and more general environmental protection legislation are the most likely to engage the human right to a healthy environment. At the federal level, the most relevant legislation is the *Water Act 2007* (Cth) and the *Environment Protection and Biodiversity Conversation Act 1999* (Cth). It is difficult to foresee how consideration of the right would influence judicial interpretation of these pieces of legislation, given that they are both already guided by the principles of ecologically sustainable development. However, it is impossible to predict the ways in which the judiciary might utilise the right in its interpretation process, and it may be possible that consideration of the HRTHE could influence the interpretation of this type of legislation to help 'fill gaps' where they arise. However, the judiciary would be limited in its ability to address gaps in legislation through the interpretive process, owing to the confines of the judicial role under judicial review. For instance, in *Barrington - Gloucester - Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure* [2012] NSWLEC 197, the NSW Land and

[152] Leana Papaelia, *ACT Court of Appeal Considers Human Rights Interpretative Principle* (2009) Human Rights Law Centre <http://hrlc.org.au/r-v-fearnside-2009-actca-3-24-february-2009/>.
[153] *Human Rights Act 2004* (ACT), s 27A.
[154] Australian Capital Territory Economic, Social and Cultural Rights Research Project, *Australian Capital Territory Economic, Social and Cultural Rights Research Project Report* (2010) 58 <http://regnet.anu.edu.au/sites/default/files/uploads/2015-05/ACTESCR_project_final_report.pdf>.
[155] Ibid 20.

Environment Court was required to consider challenges to approvals to grant an exploration licence for coal seam gas. The judgment of Justice Pepper began by acknowledging the 'contentious' nature of coal seam gas mining, whilst noting that an assessment of the 'merits, or otherwise, of the use of this resource are irrelevant to the issues raised for determination'.[156] Her Honour emphasised that judicial review is concerned only with the 'lawfulness of the approval under the challenge'.[157] The applicant (Stroud Preservation Alliance Inc.) contended that the Planning Assessment Commission (the government decision maker) 'failed to correctly formulate and properly consider the precautionary principle in respect of the project approval'.[158] Justice Pepper held that the principle was relevant, and had been 'adequately considered' by the Commission in making their determination.[159] In reaching this conclusion, Her Honour was cautious to delineate the line between judicial review and merits review. She explained that 'an incorrect assessment of the preconditions or the adequacy of the response if met, is not amenable to judicial review…' as 'to do so would be to trespass on the merits of the decision made by the PAC to approve the major project'. [160]

As can be seen, judges play an important role in interpreting the nature and scope of the duties imposed on government decision-makers under environmental management legislation. In *Barrington*, the Court was required to consider how broad environmental protection principles contained in legislation should have been considered by decision makers in the course of exercising their functions. However, the case demonstrates the significant limitations imposed on the judiciary due to the fact that they are unable to engage in merits review of government decisions. Despite this, even within the scope of their limited role, judicial interpretation of government duties can have a significant impact on the practical operation of environmental protection legislation. Accordingly, imposing a duty on decision makers to consider the HRTHE in their decision making could potentially have a significant impact on the way in which the nature/scope of government powers and duties are interpreted by the court, and ultimately the way in which the subject of the legislation (for example, the environment generally or water resources specifically) is protected.

[156] *Barrington - Gloucester - Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure* [2012] NSWLEC 197 [1].
[157] Ibid.
[158] Ibid [6].
[159] Ibid [7].
[160] Ibid [179].

A further possible way in which recognition of the HRTHE could operate to address 'gaps' in environmental protection legislation is through the use of statements of compatibility and reports of the Parliamentary Joint Committee on Human Rights (and state/territory equivalents) in the process of statutory interpretation. As noted by Dan Meagher, it is possible that these documents could be utilised in the process of statutory interpretation in certain instances.[161] Section 15AB (1) of the *Acts Interpretation Act 1901* (Cth) allows the court to use extrinsic material in the interpretation of legislation in certain specified circumstances:

> (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
> (b) to determine the meaning of the provision when:
> (i) the provision is ambiguous or obscure; or
> (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

However, Meagher argues that in the majority of cases statements of compatibility 'will not assist the courts in discharging their interpretive duty', which is due in part to the quality of the statements submitted thus far.[162] In support of this argument, he notes the fact that as of 2014, the Victorian Supreme Court had not used a statement 'to assist in ascertaining the proper construction of the relevant statutory provision in issue' during the course of judicial review proceedings.[163] In contrast, he argues that the reports of the Parliamentary Committee 'may prove a useful aid to the courts in ascertaining legislative meaning'.[164] In terms of the HRTHE, if the right is recognised as a relevant right for consideration by pre-legislative scrutiny bodies at the Commonwealth and state/territory levels, materials prepared during the scrutiny process could potentially be used by the court during the process of statutory interpretation in instances where the s 15AB (1) provisions apply (i.e. for example where the provision is ambiguous). Accordingly, materials outlining the legislation's potential impact on the HRTHE could be relevant considerations for the court to take into consideration in determining provisions with an ambiguous or confusing meaning. It is possible that this process could be perceived as conferring a benefit for environmental protection, as it may operate to assist the court in its consideration of the HRTHE's application. For instance, if proposed amendments to water management legislation were introduced into Parliament, the

[161] Dan Meagher, 'The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and the Courts' (2014) 42 *Federal Law Review* 1, 2.
[162] Ibid 13.
[163] Ibid.
[164] Ibid 25.

Bill effecting the amendments would need to be accompanied by a statement of compatibility explaining how the amendments are consistent with the HRTHE.

It may do so on the grounds that the proposed modification seeks to pursue sustainable management of the resource. If the Parliamentary Joint Committee on Human Rights then considered that statement and agreed that the legislation was compatible with the right on those grounds, that view would be recorded in the relevant official report. If a provision introduced or modified by the amendments was then challenged in court, the judiciary would be able to examine these materials in order to assist in determining the meaning of the provision, if the meaning was ambiguous (or if one of the other s.15AB (1) conditions applied).

If the court was being asked to adopt an interpretation of the provision which did not accord with the parliament's intent to ensure sustainable management of the resource, the court could look to these materials to support an interpretation that furthers the purpose of the legislation as explained in the statement and report. Of course, it must be acknowledged that such an interpretive process could operate in a different manner, for instance where the statement of compatibility made it clear that the legislation was intentionally incompatible with the right. However, as noted by Meagher, early indications suggest significant government reluctance 'to concede that any proposed law is incompatible with human rights'.[165] Accordingly, it can be seen that the right's impact on the statutory interpretation process may facilitate the 'filling of gaps' in environmental protection legislation by the judiciary.

7.7.6 Avenues to bring legal actions in the interests of environmental protection

Legislative recognition of the right could create more legal avenues to challenge government decision making, and may also serve to strengthen arguments to maintain extended standing provisions and to support calls for further extensions of standing rules in order to facilitate public interest actions pursuing environmental protection aims. If a federal bill of rights was introduced, it would likely contain a provision similar in form to the Victorian and ACT charter provisions, relating to the duties imposed on public authorities. For example, s. 38 (1)

[165] Ibid 9. Although he notes that it has occurred in Victoria.

of the Victorian Charter provides that 'it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right'.[166]

In the case study context of water management, if a similar provision was enacted in a federal human rights act recognising the HRTHE, decision making by government agencies relating to water resources management would need to consider the HRTHE. For example, decisions made by public authorities pursuant to the *Water Act 2007* (Cth) would need to be made in a manner compatible with the HRTHE. Under the Act, the Murray-Darling Basin Authority (MDBA) has responsibility for creating the 'Basin Plan'. Accordingly, decisions made by the MDBA in relation to the Basin Plan would need to be made compatibly with the HRTHE. The Authority is already required to take a number of considerations into account in exercising its powers and performing its functions in relation to the Basin Plan.[167] For instance, the Authority and the Minister must 'take into account the principles of ecologically sustainable development',[168] 'act on the basis of the best available scientific knowledge and socio-economic analysis',[169] and 'have regard' to a number of other considerations:[170]

(i) the National Water Initiative;
(ii) the consumptive and other economic uses of Basin water resources;
(iii) the diversity and variability of the Basin water resources and the need to adapt management approaches to that diversity and variability;
(iv) the management objectives of the Basin States for particular water resources;
(v) social, cultural, Indigenous and other public benefit issues;
(vi) broader regional natural resource management planning processes;
(vii) the effect, or potential effect, of the Basin Plan on the use and management of water resources that are not Basin water resources;
(viii) the effect, or the potential effect, of the use and management of water resources that are not Basin water resources on the use and management of the Basin water resources; and
(ix) the State water sharing arrangements.

It is difficult to see how consideration of the HRTHE would add much to this consideration process. Although the content of the right is not yet known, it is likely that the HRTHE would require consideration of similar considerations (such as the principles of ESD). However, if an individual or organisation believed that the right had been inadequately considered (or not considered at all), they might be able to engage in judicial review of the decision. Under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), an applicant can seek review of a

[166] *Charter of Human Rights and Responsibilities Act 2006* (VIC), s 38 (1).
[167] *Water Act 2007* (Cth), s 21 (4).
[168] *Water Act 2007* (Cth), s 21 (4) (a).
[169] *Water Act 2007* (Cth), s 21 (4) (b).
[170] *Water Act 2007* (Cth), s 21 (4) (c).

decision to which the Act applies on various grounds, including on the grounds of an improper exercise of power (for example, taking an irrelevant consideration/not taking a relevant consideration into account in the exercise of a power).[171] It is possible that an applicant could argue that in making a decision, an authority failed to adequately take into account the HRTHE. The knowledge that their decisions could be subject to review on these grounds could encourage government decision-makers to take their duty to consider the right more seriously. Moreover, jurisprudence created through challenges made on these grounds could help to clarify the nature of the duty for decision-makers.

In addition to the impacts on grounds of review, recognition of the right could possibly serve to strengthen arguments to broaden standing. At present, under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), an applicant must demonstrate that they are a 'person aggrieved' by a decision to which the Act applies.[172] The Act's interpretation section explains that for the purposes of the legislation a 'person aggrieved' includes a reference to 'a person whose interests are adversely affected by the decision'.[173] The meaning of the term was considered by Ellicott J in *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 36 ALR 64, who explained that:[174]

> 'The words "a person aggrieved" should not, in my view, be given a narrow construction. They should not, therefore, be confined to persons who can establish that they have a legal interest at stake in the making of the decision… This does not mean that any member of the public can seek an order of review. I am satisfied, however, that it at least covers a person who can show a grievance which will be suffered as a result of the decision complained of beyond that which he or she has as an ordinary member of the public…'

Recently, in *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* (2014) 254 CLR 394, the High Court affirmed that the meaning of 'person aggrieved' should not be interpreted narrowly and can include persons whose economic interests have been adversely affected by a decision.[175] Accordingly, the person aggrieved test under the ADJR Act is relatively broad. However, standing under the ADJR Act has been extended for decisions made under the EPBC Act/regulations.[176] This extended standing means that individuals will be taken to be a person aggrieved for the purposes of the ADJR

[171] *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 5 (1) (e).
[172] *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 5 (1).
[173] *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 3 (4) (a) (i).
[174] *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 36 ALR 64, 79.
[175] *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* (2014) 254 CLR 394, 395.
[176] *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 487 (1).

Act if 'at any time in the 2 years immediately before the decision, failure or conduct, the individual has engaged in a series of activities in Australia or an external Territory for protection or conservation of, or research into, the environment'.[177]

An identical provision applies to organisations/associations, with the added stipulation that 'at the time of the decision, failure or conduct, the objects or purposes of the organisation or association included protection or conservation of, or research into, the environment'.[178] Recently, the Federal Government moved to remove this extended standing provision under the EPBC Act,[179] on the grounds that allowing extended standing constitutes 'a major threat to the administration of the EPBC Act' as it delays projects and increases costs.[180] Recently, the Parliamentary Joint Committee considered the Bill and concluded that the amendments 'could result in a failure to properly enforce the protections' under the Act, and therefore it could 'engage and limit the right to health and a healthy environment'.[181] The Committee noted that the statement of compatibility accompanying the Bill did not consider the right to health or the right to a healthy environment.[182]

The Committee reasoned that as the UNCESCR has stated that a violation of the right to health can occur where pollution laws are inadequately enforced, limiting the ability of environmental protection advocates to enforce those laws might 'engage and limit' the HRTHE.[183] Accordingly, the Committee is now seeking advice from the Minister for the Environment 'as to whether the bill limits the right to a healthy environment', and if it does, to provide a response to the following questions:[184]

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

[177] *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 487 (2).
[178] *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 487 (3).
[179] Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (Cth).
[180] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 2015 (Greg Hunt).
[181] Parliamentary Joint Committee on Human Rights, *Twenty-Seventh Report of the 44th Parliament* (2015) 4 [1.19].
[182] Ibid 5 [1.23].
[183] Ibid 5 [1.25]-[1.26].
[184] Ibid 5 [1.29].

In doing so, the Committee emphasised that the identified 'legitimate objective' must 'address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient'.[185] To be legitimate, the objective must also 'be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law'.[186] Arguably, a persuasive argument can be mounted against the legitimacy of the objective being pursued, the connection between the limitation and the objective, and the reasonableness of the measure for achieving the objective.

The 'objective' of the proposed legislation can be ascertained by examining the comments made by the Attorney-General and the Minister for the Environment. In a statement announcing the proposed legislation, the Attorney-General Senator George Brandis, stated the rationale for the Bill:[187]

> The Government has decided to protect Australian jobs by removing from the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) the provision that allows radical green activists to engage in vigilante litigation to stop important economic projects.
>
> Section 487 of the EPBC Act provides a red carpet for radical activists who have a political, but not a legal interest, in a development to use aggressive litigation tactics to disrupt and sabotage important projects.
>
> The activists themselves have declared that that is their objective – to use the courts not for the proper purpose of resolving a dispute between citizens, but for a collateral political purpose of bringing developments to a standstill, and sacrificing the jobs of tens of thousands of Australians in the process.

In the Minister for the Environment's second reading speech, Mr Hunt explained that the Bill had been introduced to address 'a major threat to the administration of the EPBC Act'.[188] The threat referred to was the use of the extended standing provision by environmental conservationists to 'disrupt and delay key projects and infrastructure', in order to 'increase investor risk'.[189] Mr Hunt characterised this type of public interest litigation as a 'well-funded and coordinated strategy to frustrate the careful consideration of the EPBC Act approval process…'[190] He explained that the proposed removal of the extended standing provision would mean that only 'those with a genuine and direct interest in a matter, such as farmers

[185] Ibid 5 [1.27].
[186] Ibid.
[187] George Brandis, *Government Acts To Protect Jobs From Vigilante Litigants* (Media Release, 18 August 2015).
[188] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 2015 (Greg Hunt).
[189] Ibid.
[190] Ibid.

and landowners' could bring an action.[191] Retaining the provision would be problematic in his opinion as it 'allows virtually any person or group to bring a lawsuit, regardless of whether they are adversely affected or even near a project'.[192]

It is questionable whether this constitutes a 'legitimate objective' according to the criteria described above. Arguably, this proposed amendment does not address a 'pressing or substantial concern', and could in fact be characterised as 'simply seek[ing] an outcome regarded as desirable or convenient'. Compared to other jurisdictions (such as the US), and within the broader context of the quantity of environmental approvals processed each year, very few actions are brought utilising the extended standing provision.[193] Accordingly, the 'concern' is arguably too insubstantial to constitute a legitimate objective.

Moreover, it is questionable to contend that it is problematic to allow individuals and organisations without a 'direct' interest in the subject matter to bring an action. The human right to a healthy environment seeks to protect the fundamental interest that all human beings have in protecting the natural environment. From this perspective, every human has an interest in the enforcement of environmental protection legislation, irrespective of their proximity to a proposed environmental impact. It is not only landholders and farmers who have an interest in the environmental impacts of proposed projects. All Australians have an interest in the assessment and approval processes governing the regulation of those impacts.

Even if it is accepted that the type of litigation referred to does constitute some form of threat to the EPBC Act processes and therefore removal of the extended standing provision can be viewed as being aimed at achieving a 'legitimate objective', it is arguable whether the limitation is a reasonable and proportionate means to that ends. Removing the extended standing provision for *all* of the individuals/organisations which currently fall within its operation is arguably unnecessary to address the identified problem. There are already various

[191] Ibid.
[192] Ibid.
[193] Donald K. Anton, 'Attorney-General George Brandis trying to close doors on environmental challenges' *The Age* (online) 23 August 2015 <http://www.theage.com.au/comment/brandis-trying-to-close-the-court-house-doors-20150822-gj5k69.html#ixzz3kHrlEy48>.

systems in place to address the problem of vexatious litigants in the court system.[194] In order to bring the actions referred to in the Minister for the Environment and the Attorney General's statements, environmental protection groups would have to establish grounds for their action. The Court would not entertain frivolous of unmeritorious claims. Moreover, as noted by Edgar, the grounds of review for public-interest based claims are significantly limited.[195]

There was a compelling rationale for the original introduction of the extended standing provision in this context. As the 'environment' is incapable of representing itself through human legal and political processes, it is necessary to facilitate representation of environmental interests by human individuals and organisations. It is not accurate for the Minister for the Environment to draw analogies with standing under the *Australian Crime Commission Act 2002* (Cth), or the *Biosecurity Act 2015* (Cth).[196] Environmental protection legislation is unique, and only truly analogous to animal protection legislation in terms of standing (as both concern subjects which are incapable of representing themselves).

Making it more difficult for environmental conservationists and organisations to uphold the EPBC Act provisions is arguably a disproportionate means of achieving the ends of addressing allegedly vexatious litigation. Moreover, it can be argued that it unreasonably limits the human right to a healthy environment, as it limits the ability of environmental protection advocates to enforce environmental protection provisions through litigation. A more proportionate response would directly target the specific problem (vexatious litigants), rather than targeting all potential litigants who fall within the operation of the provision.

Requiring the Minister to engage in the process of justifying this limitation on the human right to a healthy environment may have an impact on the government's decision making process. Whilst it is still open to the Minister to continue with the proposed legislation in its current form, it does require the Minister to engage in the process of justifying the limitation and its

[194] Litigants can be declared vexatious in state/territory and federal courts. For an example at the federal level, see *Federal Court of Australia Act 1976* (Cth) s 37AO. For an example at the state level, in Queensland the *Vexatious Proceedings Act 2005* (Qld) enables the Supreme Court of Queensland to prohibit vexatious proceedings.
[195] Andrew Edgar, 'Extending Standing – Enhanced Accountability? Judicial Review of Commonwealth Environmental Decisions' (2011) 39 (3) *Federal Law Review* 435, 462.
[196] Ibid.

possible impact on the right, and to consider alternative options which would have less impact. Meagher notes that the New Zealand experience with pre-legislative scrutiny provides support for a 'prophylactic rights effect'.[197] He cites the reflections of a NZ Crown Law Office employee who noted that the pre-legislative scrutiny procedures have the effect of 'eliminating a large number of proposals that if enacted, may have resulted in unjustified intrusions upon human rights'.[198] As has been demonstrated, it is possible to characterise removal of the extended standing provision as both a means of facilitating and impeding the effective operation of the legislation. Whilst the government argues that removal is necessary for the protection of the functional operation of the legislation (and therefore, the broader goal of protecting the environment), various environmental protection advocates argue that the amendments will impede the ability of public interest litigants to uphold the legislation and achieve its environmental protection objectives.[199] Accordingly, as it is a question of interpretation, it is not possible to predict the substantive outcome which may result from consideration of the HRTHE.

However, the HRTHE recognises that adequate protection of the environment and enforcement of environmental protection laws are in the interests of all human beings. Accordingly, limiting access to justice in this regard to individuals and organisations with more 'direct' interests in matters concerning the environment could be viewed as contrary to the right's recognition of the inherent interests all human beings possess in ensuring the maintenance of a healthy natural environment. By making it more difficult for organisations and individuals to bring actions in the public interest, proposals to limit standing impact on access to justice and therefore Australia's fulfilment of a number of the potential obligations imposed by the right. Accordingly, legislative recognition of the HRTHE could help to increase avenues to bring legal actions in the interests of environmental protection through the creation of further grounds for review of government decision-making, and by strengthening calls for expanded standing.

[197] Dan Meagher, 'The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and the Courts' (2014) 42 *Federal Law Review* 1, 10.
[198] Andrew Butler cited in Dan Meagher, ibid.
[199] For examples, see the various submissions put forward by environmental protection organisations to the Senate Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (Cth).

7.7.7 Inform environmental quality standards

As the HRTHE may create a right to a certain minimum standard of environmental quality, recognition of the right may facilitate and strengthen calls for more stringent environmental quality standards. In the water management context, it was noted earlier that there are numerous issues facing water quality and water pollution regulation in Australia generally, and in the Murray-Darling Basin in particular. Water quality standards in Australia are variable, and relatively weak in terms of legal enforceability. Arguably, calls for stronger and more comprehensive water quality standards could be strengthened by recognition of the right. However, the key issue with respect to water quality regulation in Australia is not necessarily the articulation of standards, but rather the inadequate approach to management. As argued in Chapters Two and Six, in order to address the problem adequately, and with the seriousness it deserves, it would be beneficial for the Commonwealth to take a greater role in terms of both standard setting and enforcement. It was noted that there are various means available to the Commonwealth to increase its role in diffuse source water pollution regulation in particular. For instance, the establishment of a federal Environment Protection Authority (EPA) with the power to set national water quality standards/pollution regulations, and the enactment of federal water quality legislation stipulating mandatory water quality standards and pollution reduction targets, to be implemented and enforced by State EPA's (discussed in Chapter Six). The proposed form of legislative recognition would not assist in facilitating these reforms in a legal sense, as it would not impact on the extent of the Commonwealth's legislative power.[200] However, it might help to support calls for reform on the grounds that these reforms may be necessary to help Australia realise the right in this context. Increased Commonwealth involvement could be justified on the basis that the Commonwealth Government is the government tasked with the responsibility of meeting Australia's international human rights obligations.

It was also noted that there are significant issues with the monitoring and reporting of water quality in Australia. Again, legislative recognition of the right would not directly assist in addressing these issues. However, it may focus attention on the need to adequately monitor the health of Australia's water resources in order to ensure compliance with Australia's

[200] As noted in Chapter Six, if a constitutionally recognised HRTHE was accompanied by an expansion in Commonwealth legislative power over the topic matter of the 'environment', it may assist in providing the legislative authority for such reforms.

international human rights obligations under the ICESCR. Especially if the content of the right under the Covenant was interpreted as incorporating procedural rights, such as the right to access information about environmental health. Accordingly, whilst legislative recognition of the right would not operate in the same manner as a constitutional right in regards to this particular benefit (informing environmental quality standards), it would still be capable of realising this benefit to an extent.

7.8 Limitations of a legislative right as a tool for environmental protection in Australia

In light of the above analysis, it appears that the proposed form of recognition of the right may offer two main benefits for improving environmental protection in Australia. Firstly, it may result in increased consideration and prioritisation of environmental protection concerns in the course of legislative, executive and judicial decision making. Secondly, it may provide further avenues to challenge decision making where decision makers have failed to adequately take the right into consideration. Whilst there are certainly a number of ascertainable potential benefits associated with legislative recognition of the HRTHE, there may however be some limitations regarding the utility of the right as a tool for environmental protection.

7.8.1 Limitations associated with the form of recognition

There are various limitations inherent within the proposed form of legal recognition. Unlike a constitutional right to a healthy environment, a legislative right contained within a charter based on the dialogue model is comparatively restricted in its ability to achieve the types of benefits which have been found to be associated with the recognition of the HRTHE in other jurisdictions (as discussed in Chapter Five). Under the proposed model, all three arms of government are necessarily restricted in their ability to consider and realise the right. As the legislature is only obliged to consider the compatibility of proposed legislation with the right, the Parliament retains the power to override identified incompatibility in order to allow incompatible proposed legislation to become law. The judiciary is similarly restricted. Where the court identifies that it is not possible to adopt an interpretation in consistency with the right, it may issue a declaration of inconsistent interpretation. However, such declarations do not impact on the validity of the law, and whilst the government must provide a response, they have no duty to amend the law to render it consistent with the right.

Arguably, these limitations represent a necessary compromise in a legal system of Australia's nature. Granting the judiciary greater interpretive scope, or providing the court with the ability to invalidate legislation on the grounds of incompatibility would represent a significant departure from the status quo. Similarly, limiting parliamentary sovereignty in order to provide better protection of the right during the legislative process would be highly

controversial. Whilst respecting this compromise may be the only way to achieve legal recognition of the right, it may do so at the expense of limiting its effectiveness.

As a result of the limitations described, it is possible that legal recognition of the HRTHE may be relatively redundant, exerting very little practical impact on existing regimes for environmental protection. For example, it could be argued that given the integration of the principles of ecologically sustainable development in existing environmental protection laws, policies and procedures, consideration of the HRTHE in legislative, executive and judicial decision making may have minimal impact. Godden and Peel explain that 'ESD principles might be seen as promoting practices of decision making that are holistic in focus, consider long-term effects as well as more immediate impacts, take adequate account of scientific uncertainty, seek cost-effective solutions and incorporate community perspectives'. [201] Arguably, this impact on decision making is very similar to the likely impact associated with consideration of the HRTHE.

However, it is possible that the HRTHE may support and further the reach of ESD considerations in government decision-making. Two important factors limiting the achievement of ESD in Australia are the fact that environmental protection and management legislation does not always mandate consideration of ESD in decision making, and even where it is mandated it 'goes into the mix of factors considered in the decision-making process'.[202] In contrast, the proposed form of legislative recognition would require consideration of the HRTHE in all relevant government decision-making impacting on the right, and as it is a human right consideration it may be given greater weight as a factor.

7.8.2 Limitations associated with the nature and content of the right

Due to the nature and content of the right, recognition of the right would provide little guidance regarding how the right can be effectively realised. The right raises but does not answer numerous crucial and contentious questions. For example, the right may impose an obligation on the government to sustainably manage environmental resources, but does not

[201] Lee Godden and Jacqueline Peel, *Environmental Law: Scientific, Policy and Regulatory Dimensions* (Oxford University Press, 2009), 137.
[202] Ibid 139.

provide guidance on how this can be achieved. Similar problems face the operationalisation of the principles of ESD, which have been criticised as not providing decision-makers with 'any real guidance…as to whether and how to apply the core principles or what weight to give them'.[203] This issue is particularly relevant in the water management context, as there is significant debate regarding the most effective means of protecting Australia's water resources. A particularly divisive issue in this regard concerns the appropriate role of the Commonwealth government in water policy, planning and management.

As discussed, the increasing role of the Commonwealth facilitated by the *EPBC Act* and the *Water Act* in the water resources context has been challenged in various ways. For example, there have been attempts to amend the water trigger under the *EPBC Act*, and to place a cap on water purchases in the MDB under the *Water Act*. Recognising the HRTHE under a federal bill of rights would not necessarily prevent either of these reforms from passing. Although it would require consideration of the consistency of the amendments with the right, it is not certain that a reduction in Commonwealth oversight of coal seam gas mining water impacts or the imposition of a limit on Commonwealth involvement in the water market would necessarily constitute any sort of infringement of the right. Apart from the fact that it is the Commonwealth government which has the duty to fulfil the obligations imposed by the right, there is no inherent presumption within the content of the right that Commonwealth regulation and involvement is preferable. Accordingly, the right may not be of great assistance in resolving this crucial debate.

Similarly, the right is not capable of resolving debates regarding the efficacy and desirability of market based mechanisms for water resources management. Arguably, these mechanisms offer one of the most effective means of improving environmental protection in the water resources context, especially in relation to the over-allocation of water resources, and conflicts and tensions over water rights. However, as discussed earlier, the right does not dictate any particular 'means' for achieving its realisation. Accordingly, the right would be of limited assistance in resolving disputes over the appropriateness of market based mechanisms vs. more traditional environmental regulation and protection approaches.

[203] Paul Stein, 'Are Decision-Makers Too Cautious with the Precautionary Principle?' (2000) 17 *Environmental and Planning Law Journal* 3, 3.

Despite this, as demonstrated by the water case study, it is still possible that recognition could assist in addressing some aspects of the key challenges facing environmental protection. For example, by increasing avenues for environmental protection advocates to bring legal actions, it could contribute to better enforcement of water pollution laws. By requiring proposed legislation to be scrutinised for consistency with the HRTHE, it may encourage a different balancing of environmental protection interests against competing property interests in water. Through requiring government decision-makers to consider the right in their decision making processes, it may impact on how water rights are allocated and how water resources are managed generally. However, ultimately the precise impact of the right in this context cannot be ascertained until the content of the right is known.

It is possible that the right's lack of guidance in regards to the most effective means of realisation could be viewed as a necessary and beneficial limitation. Rather than dictating how the right should be realised, it allows for the development of different approaches, and respects the government's need to balance environmental governance in accordance with both the popular will and human rights standards.

7.8.3 Limitations associated with the social and political context

Another important area of limitation relates to the fact that many of the key challenges facing the full realisation of the HRTHE and environmental protection cannot be resolved through legal recognition of the right. These issues include political disagreements over environmental policy, competing economic, social and cultural interests, sourcing funding for monitoring and enforcement, differing social attitudes and values, technical challenges, and scientific uncertainties. Solutions to these varied and significant issues are generally beyond the scope of a limited legal tool. In many instances, what is required in order to improve environmental protection is systemic or cultural change. Whilst recognition of the right could provide an impetus for such change, it cannot of itself address many of the key problems impeding the achievement of sustainable environmental management. There are inherent constraints limiting the effectiveness of environmental protection approaches created by the existing social, political and legal context. As noted by Godden and Peel, '[s]ustainability problems have systemic causes 'located deep in patterns of production and consumption, settlement and

governance''.[204] Rodriguez-Rivera notes that critics have questioned the utility of the human right to a healthy environment on the grounds that it 'may not address the complex and technical issues' involved in environmental protection, and that it 'merely addresses the social symptoms and does not solve the structural causes of environmental degradation…'[205]

Weston and Bollier argue that the operation of the right is limited by this context as 'our formal/official national and international legal orders are structurally organized to contribute to – and not prevent – the deterioration of the natural world'.[206] They contend that as environmental governance must operate within the broader context of the capitalist system, 'the mainstream economic and political paradigm will not take the right to environment seriously, and it will remain an idiosyncratic influence at best.'[207] This critique is shared by the earth jurisprudence/wild law theories discussed earlier in Chapter Three. Some commentators within these schools of thought are sceptical of the ability of human rights to address environmental protection issues, given the structural causes of environmental degradation.[208] Whilst certainly more 'radical' rights alternatives (such as the rights of nature) provide a greater challenge to the current system, as discussed earlier, that is precisely why they are unlikely to be politically feasible in the Australian legal/political environment.

Arguably, full realisation of the HRTHE would require significant structural reforms. Full realisation could represent a challenge to existing environmental regulation regimes which merely seek to minimise (rather than eradicate) environmental harm. As noted by Bates, 'the prevailing assumption is that development and growth should be allowed to proceed unless there are clearly proven reasons for limiting it'.[209] Systems which aim to achieve a balance between environmental protection and the protection of private property and economic interests can 'fail to acknowledge the potentially inherent bias in institutional decision-making

[204] Godden and Peel citing Dovers and Connor, above n 201, 138.
[205] Luis E Rodriguez-Rivera, 'Is the Human Right to Environment Recognized Under International Law? It Depends on the Source' (2001) 12 (1) *Columbia Journal of International Environmental Law and Policy* 1, 31.
[206] Burns Weston and David Bollier, *Regenerating the Human Right to a Clean and Healthy Environment in the Commons Renaissance* (2011) 24 <http://www.commonslawproject.org/>.
[207] Ibid 25.
[208] For example, see Peter D Burdon, 'Environmental Human Rights: A Constructive Critique' in Anna Grear and Louis J Kotzé (eds) *Research Handbook on Human Rights and the Environment* (Edward Elgar Publishing, 2015) 61.
[209] Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 2013) 236.

towards economic and social values'.[210] In some instances, it may be the case that proper realisation of the right would involve a removal or reduction in property rights, which may result in negative economic impacts. Allowing the right to operate in this manner would constitute a significant departure from the status quo, and is unlikely to be accepted in the near future. For this reason, facilitating progressive realisation through the proposed form of legal recognition, constitutes a pragmatic 'working within the system' approach to gradually realising the right within the existing political and legal context.

7.8.4 Redundant or dangerous

As demonstrated above, a legislative right is limited in its ability to deliver the environmental protection benefits which have been associated with constitutional recognition in other jurisdictions. In most instances, recognition of the right will simply serve to strengthen arguments to improve environmental protection, whilst leaving the ultimate decision as to whether and how this is achieved to the government. For this reason, it can only be stated that the right may operate to address aspects of some of Australia's key environmental protection challenges. This does not however render the right 'redundant' as a legal tool for improving environmental protection, due to the various potential benefits outlined above.

However, as discussed in the previous chapter, it is possible that the right could be viewed as operating in a 'dangerous' manner, as it could react with existing systems in unpredictable and non-beneficial ways. For example, significant debate exists regarding the desirability of altering the role of the judiciary in this context. Whilst providing further avenues to challenge government decision making can be beneficial as a means of providing an additional check on the exercise of government power, it can also involve the judiciary in questions which should perhaps not fall within the ambit of judicial consideration. It may be argued that it is more appropriate for the legislature to consider the best avenues for realisation of the right, and that involving the judiciary in questions of this nature would be problematic both in terms of consistency with the nature of the judicial role in the Australian legal system, and in terms of enabling the government to pursue effective policies to achieve realisation of the right without interference from the judiciary. Once the right is recognised, it will not be possible to completely predict the ways in which it will interact with existing systems, and how it will be

[210] Ibid.

interpreted and applied. As can be seen with the experience of the recognition of civil and political rights at the state/territory level in Australia, novel interpretations and arguments can develop, leading to unexpected results.

Arguably however, these concerns are more applicable in the context of a constitutionally recognised HRTHE. A legislative right would not involve the judiciary in the types of controversial questions which might arise as a result of constitutional recognition. As noted in the previous chapter, courts have taken a very active role in regards to implementation of the right in various countries where the right has received constitutional recognition. Such an active role for the court is not possible in relation to the proposed legislative right. The judiciary would not be permitted to invalidate legislation which was found to be inconsistent with the right, and would be unable to fashion the types of novel legal remedies which have been utilised in other jurisdictions where the right has received constitutional recognition. It certainly could not dictate to the legislature or the executive *how* the right to a healthy environment should be realised.

In this respect, the 'dangers' associated with constitutional recognition are largely mitigated by the limitations on the three arms of government which are inherent within the form of legislative recognition proposed, as legislative and executive action cannot be invalidated by the judiciary on the basis of inconsistency with the right. Those potential 'dangers' that do remain arguably do not constitute adequate grounds upon which to reject legislative recognition of the right. Namely, the risk of unintended and undesirable consequences resulting from the dialogue process. Unlike with the operation of a constitutional right, most undesirable or unintended consequences could be remedied relatively easily. A statutory bill of rights can be amended through ordinary legislative amendment processes, and the parliament would retain the ability to expressly override the right where it was deemed necessary.

7.8.5 Likelihood of legislative recognition

At present, it is unlikely that the right would receive legislative recognition under statutory bills of rights at either level of government. As noted earlier, the National Human Rights Consultation Committee recommendation for the introduction of a federal statutory bill of

rights based on the dialogue model was not implemented by the Australian Government. Most of the state/territory jurisdictions are similarly yet to adopt bills of rights legislation. Of those that have already adopted rights charters, they have not recognised ESC rights, and do not look set to do so in the near future. Accordingly, not only is it unlikely that the recommended forms of legislative recognition will be adopted in the current political climate, even if they were it is unlikely that ESC rights would be included. In the absence of express recognition of the right, the only option for recognition would be recognition as an implied right. However, if ESC rights were not recognised, there would be no express rights from which the implied right to a healthy environment could be derived.

Despite the slim likelihood of legislative recognition at present, legislative recognition is more likely than constitutional recognition. Two Australian jurisdictions have already adopted legislative rights charters based on the dialogue model, and the prospect of a Commonwealth statutory rights charter has been seriously debated for decades. It is accordingly more likely that if bills of rights were adopted they would be legislative rather than constitutional in form.

7.9 Conclusion

Is it possible to provide legislative recognition of the human right to a healthy environment in Australia? If so, what is the most preferable form of legislative recognition? Can the potential benefits for environmental protection identified for domestic legal recognition be realised through the preferable form of legislative recognition? How could these benefits be realised in the Australian water management context? What are the potential limitations?

The aim of this chapter was to explore the possible options for legislative recognition of the human right to a healthy environment in Australia. It has been demonstrated that both levels of government are likely to possess the requisite legislative power to pass legislation recognising the right. Although various legislative recognition options were considered, it was argued that Commonwealth and state/territory recognition of statutory bills of rights recognising an express independent HRTHE based on the dialogue model would be the most preferable legislative recognition option. This was justified on the basis that express recognition overcomes the various challenges posed by implied recognition, and recognition of the HRTHE within the context of a bill of rights enables the right to be interpreted in the context of other ESC rights.

It was argued that the proposed legislative option could increase government accountability, encourage rights awareness in executive decision-making, facilitate proactive action on legislation which has the potential to breach the obligations imposed by the right, and create more avenues for review of government decision-making. Accordingly, it was concluded that a number of the potential benefits of legal recognition for environmental protection outlined in Chapter Five are capable of being realised through the proposed form of legislative recognition. Utilising the thesis' case study of water management, it was demonstrated how recognition could potentially lead to greater consideration and possibly prioritisation of environmental protection in government decision-making and impact on the development of proposed legislation.

Possible criticisms of recognition were addressed, including claims that the right may prove to be redundant or dangerous in its operation. It was concluded that whilst there is some merit to these arguments, acknowledgment of the issues canvassed does not constitute a definitive argument against legal recognition. Rather, it provides a pragmatic caution as to the limited utility of the right as a tool for environmental protection. A vast range of complicated factors contribute to Australia's environmental protection issues, which are

beyond the scope of redress by a limited legal tool. Many of the key challenges facing the protection of Australia's natural environment stem from a systemic acceptance of environmental harm. Recognition of the human right to a healthy environment can not, and can not be expected to, address the fact that Australia's environmental protection regimes operate on the presumption that a certain (and sometimes significant) degree of environmental harm is legally tolerated. For instance, pollution of land and water resources by mining and agricultural industries is generally regulated, rather than completely prohibited. Accordingly, if the right is recognised it will have to operate within this broader context, and will therefore be limited in its ability to achieve significant reform.

However, the right should not be viewed as a 'redundant' tool for environmental protection as a result. As demonstrated earlier in the chapter, there are various impacts of recognition which may provide environmental benefits. Principally, recognition could lead to greater consideration and possibly prioritisation of environmental protection in government decision making and impact on the development of proposed legislation. The risk of unintended or 'dangerous' consequences flowing from such recognition does not constitute a strong argument against recognition. There are risks inherent with any legislative change, and experience in other jurisdictions and with the state/territory human rights legislation demonstrates that for the most part these concerns are not significant issues in practice. Therefore, this thesis advocates for consideration of the adoption of a statutorily recognised HRTHE as an additional tool for improving environmental protection in Australia.

Chapter Eight
Conclusion

Could international and domestic legal recognition of the human right to a healthy environment offer any potential benefits for environmental protection in Australia?

8.1 Introduction

The aim of this thesis was to evaluate whether legal recognition of the human right to a healthy environment at the international level and in Australia's domestic laws may offer benefits for environmental protection in Australia. In order to respond to this question, the thesis was structured into six substantive chapters, each designed to address a specific set of research sub-questions.

This chapter presents the conclusions reached in response to these questions, and provides a response to the overarching research question. It explains that it was ultimately concluded that Australian legal recognition of the human right to a healthy environment may be a useful, although limited, tool for environmental protection. It emphasises that the general utility of the right should not be overstated, given the limited scope of the thesis, the significant and broad ranging nature of the challenges facing environmental protection, and the limited operation of the right.

The significance of the research as an original and useful contribution to the relevant bodies of literature is then discussed. It is explained that the research contributes to three significant gaps in the scholarship. The limitations of the research are highlighted, and areas for further research are identified. It is acknowledged that as the research is necessarily limited in scope, there is significant scope for further research considering the potential application of the right in other environmental protection contexts and under alternative legal recognition models. The subjective nature of some aspects of the legal analysis are also identified, leading to a call for further scholarly discussion and critical engagement with the issues raised. Finally, potential avenues for future research adopting a different analytical scope, and a different methodological approach are encouraged.

8.2 Conclusions

This section outlines the conclusions reached in response to each set of research sub-questions.

8.2.1 Research sub-questions

The research sub-questions explored in Chapters 2-7 were outlined in Chapter One, as follows:

1. What are the current approaches to environmental protection in Australia? Have these approaches been successful in achieving ecologically sustainable development? What are some of the key environmental protection challenges facing Australia? What approaches to environmental protection have been adopted in the Murray-Darling Basin water management context, and how effective have they been?
2. What is the environmental rights revolution, and why has it emerged? What are the types of environmental rights which have been recognised? Has Australia embraced the concept of environmental rights? If not, what are the possible factors explaining Australia's reluctance?
3. Can the human right to a healthy environment be established as a moral right? What is the legal status of the right under international law? What is the scope and content of the right, and what obligations does it impose on states? How can compliance with the obligations imposed by the right be assessed at the international level?
4. What are some potential benefits for environmental protection in Australia associated with international legal recognition of the human right to a healthy environment? How could the human right to a healthy environment be recognised under Australia's domestic laws? What potential benefits for environmental protection may be associated with domestic legal recognition of the right? What are the possible limitations of both forms of recognition?
5. Is it possible to recognise the human right to a healthy environment under the Australian Constitution? If so, what is the most preferable form of recognition? Can the potential benefits for environmental protection identified for domestic legal recognition be realised through the preferable form of constitutional recognition? How could these benefits be realised in the Australian water management context? What are the potential limitations?

6. Is it possible to provide legislative recognition of the human right to a healthy environment in Australia? If so, what is the most preferable form of legislative recognition? Can the potential benefits for environmental protection identified for domestic legal recognition be realised through the preferable form of legislative recognition? How could these benefits be realised in the Australian water management context? What are the potential limitations?

8.2.2 Conclusions in response to the research sub-questions

Chapter Two set the context for the thesis, by explaining the nature of current approaches to environmental protection in Australia. As the thesis seeks to evaluate the utility of adopting a rights-based approach as an additional tool for environmental protection, it was important to explain the nature of current approaches, and to assess their effectiveness in addressing the challenges facing environmental protection. Through this process, it was identified that despite the existence of a complex system of environmental regulation, there are a number of challenges facing the achievement of ecologically sustainable development and adequate environmental protection in Australia. The chapter then outlined the current approaches to environmental protection in the water management context in the Murray-Darling Basin. As water management was utilised as a case study throughout the thesis, it was necessary to explain the nature of the current system and to identify the current challenges facing environmental protection in this context. The chapter concluded that in light of continuing environmental protection challenges, consideration of additional possible approaches to environmental protection (such as rights-based approaches) is warranted.

Chapter Three aimed to explain why Australia has thus far failed to embrace rights-based approaches to environmental protection. In order to understand Australia's exceptionalism, it first sought to identify the factors contributing to the emergence of the rights revolution at the global level. It was suggested that this trend can be attributed to various possible factors, including a growing concern that traditional approaches to environmental protection are incapable of adequately protecting the natural environment, and the popularity of the 'rights' discourse as a means of protecting fundamental interests. It was explained that there are various types of environmental rights available for adoption in Australia, ranging from environmental human rights to more ecocentric rights concepts. It was concluded that given Australia's reluctance to comprehensively recognise human rights, it is unlikely that

Australian legislatures would engage with rights of a more controversial nature, such as the rights of nature. A number of possible factors explaining Australia's refusal to join the environmental rights revolution were discussed. It was suggested that there may be a perception that broad environmental rights declarations do not sit easily with Australia's existing legal and political systems, which tend towards a preference for incremental rights recognition. It was further noted that Australia's approach to environmental protection is not characterised by a willingness to make broad sweeping guarantees of environmental protection. Moreover, it was hypothesised that there may be a perception that environmental rights recognition is unnecessary, as Australia already has a complex system of environmental regulation in place across three levels of government (as outlined in Chapter Two). However, it was argued that consideration of rights-based approaches is warranted, in light of the fact that Australia is yet to achieve the goal of ecologically sustainable development, and continues to face various environmental protection challenges.

Having concluded that nature rights-based approaches would be highly unlikely to be recognised in Australia, the chapter advocated for consideration of the application of a human rights-based approach in the Australian environmental protection context. A human rights-based approach has the benefit of being more accepted within the existing legal and political framework, and enables environmental protection to utilise the institutions and concepts associated with the human rights enterprise. It was argued that the anthropocentric nature of this approach can be viewed as a strength, as it characterises environmental protection as a human interest. Accordingly, legal recognition of the human right to a healthy environment was identified as a potentially useful approach for consideration in the Australian context.

Chapter Four considered the existence of the human right to a healthy environment as a moral right, and as a legal right under international law. Acknowledging the contentious debates over the identification and definition of emerging human rights, it was concluded that a persuasive argument can be mounted for the existence of a moral right to a healthy environment. This was justified on the basis of an interest based theory of rights, arguing that all human beings have an interest in maintaining a natural environment, and this interest is sufficiently important to warrant protection by a right. The chapter then considered the

status of the right at international law. It was concluded that whilst arguments can be made to support the existence of the right under customary international law, this basis for the right is too contentious at present. Accordingly, it was argued that the right can be interpreted as an implied right under one of the two major international human rights treaties comprising the international bill of rights, namely, the *International Covenant on Economic, Social and Cultural Rights*. Although it was recognised that the right has not yet received recognition by the United Nations under the Covenant, or any other binding global agreement, it was argued that the right may be recognised as either an implied or express right in the future. Accordingly, the chapter sought to identify the potential content of the right as an ICESCR right. As no authoritative guidance has been provided by the relevant UN Committee (the UNCESCR), the chapter devised a methodology for identification of the potential content of the right. This involved consideration of the Committee's approach to identification of the content of the implied human right to water, which has been recognised as an implied right under the Covenant, derived from the same express rights as the possible implied human right to a healthy environment (the human rights to health and an adequate standard of living). By applying this approach to the identification of the HRTHE's possible content, a number of potential obligations imposed by the right were identified.

These included obligations to recognise the right at the domestic level, to provide a legal and policy framework for sustainable environmental management, to ensure adequate standards of environmental quality, and to ensure adequate access to environmental resources and information about environmental health and management. It was acknowledged that whilst these potential obligations have not been articulated by an authoritative body, they can be utilised to guide the thesis' analysis of the right's possible operation. The chapter concluded by considering how compliance with these obligations could be assessed through the use of human rights indicators. It was argued that although the development of human rights indicators to measure progress towards realisation of the right are necessary, it is not yet possible to devise a set of progress indicators for the right as the right's content has not been authoritatively outlined.

Chapter Five considered the potential benefits for environmental protection in Australia associated with international and domestic legal recognition of the right. Three potential

benefits of international legal recognition were identified and discussed. Namely, increased scrutiny of Australia's environmental protection performance, the ability to benefit from international experience with implementation of the right, and comparison against international standards. In particular, it highlighted the possibility that if Australia chose to ratify and sign the Optional Protocol to the ICESCR in the future, Australian citizens would be empowered to submit communications to the UNCESCR alleging violations of the HRTHE. It was argued that although the Committee's views are not binding, they can be highly persuasive and lead to changes in state behaviour. This increased international scrutiny could be viewed as beneficial for Australian environmental protection, as it could lead to the enactment of necessary reforms. However, the chapter concluded by noting three limitations on the right's impact on environmental protection in this regard. Specifically, the possibility that the obligations imposed by the HRTHE may be largely duplicative of Australia's existing international environmental law obligations, the fact that a number of the benefits are already being achieved via other mechanisms, and the inconsistent record of the Australian Government in regards to fulfilment of human rights obligations which have not been recognised under domestic legislation.

Despite these limitations it was argued that there are discernible distinct benefits for environmental protection associated with international legal recognition of the right. The chapter then considered the possible options for domestic legal recognition and expression of the right, concluding that the most appropriate expression is recognition of a 'human right to a healthy environment'. It then considered the potential benefits for environmental protection associated with domestic legal recognition of the right. In order to scope the analysis, it identified a set of potential benefits which have been realised in other jurisdictions where the right has received recognition. These include, increased emphasis on the fundamental importance of the interrelationship between human health and wellbeing and the natural environment, a stronger basis for environmental laws and policies, increased prioritisation of environmental protection considerations in government decision-making, the creation of safeguards against environmental protection rollbacks, the creation of a safety net by filling gaps in environmental legislation, increased avenues to bring legal actions in the interests of environmental protection, and impacts on environmental quality standards. It was argued that realisation of these benefits in the Australian context would satisfy the definition of benefits for environmental protection outlined in Chapter One, as they would

potentially assist in the achievement of ESD and help to address some of Australia's environmental protection challenges. Accordingly, it was concluded that consideration of the potential realisation of these benefits under different forms of constitutional and legislative recognition was warranted.

Chapter Six considered the options for constitutional recognition of the right at the Commonwealth and state/territory levels. It was explained that the *Commonwealth Constitution* does not expressly or impliedly recognise the HRTHE. Accordingly, the options for express constitutional recognition under the *Commonwealth Constitution* were considered, including recognition of the right within a broader constitutional bill of rights, recognition in the Preamble of the *Constitution*, and recognition within an existing chapter. Recognition in state constitutions and territory self-governing legislation was also considered. It was concluded that whilst there may be benefits associated with each potential form of recognition at the Commonwealth level, the most comprehensive and preferable form of Commonwealth constitutional recognition is recognition of the right as an independent right within the context of a broader constitutional bill of rights.

The possible realisation of the identified set of potential benefits under this form of constitutional recognition was then considered. Utilising the thesis' case study, it was demonstrated that all of the identified benefits could possibly be realised to some extent. However, despite these benefits, two key criticisms of the right as a tool for environmental protection were considered. Namely, that the right may prove to be either redundant or dangerous in its operation. It was argued that it would be unlikely that the right would be redundant in its operation, given the experience with other constitutionally recognised rights, and the powers that the judiciary would possess with respect to addressing violations of the right. As for the contention that the right may prove to be 'dangerous' for democracy due to the role of the judiciary in its interpretation and application, it was argued that given the conservative judicial approach to rights interpretation at present, it is unlikely that the courts would adopt an expansive interpretation of the HRTHE. However, it was acknowledged that the right would grant the judiciary significant power, which would constitute a significant departure from the status quo. The prospect of activist judges utilising the right as a means to achieve policy objectives was considered. However, it was argued that there are various

constraints on judicial activism which would likely operate to prevent such activism. Despite this, it was concluded that constitutional recognition of the right is unlikely in the Australian context. This was attributed to three main factors. Namely, the history of limited constitutional amendment, a traditional reluctance to recognise express constitutional rights, and the controversial nature of the right. Accordingly, the subsequent chapter was devoted to consideration of legislative recognition options.

Chapter Seven considered the possibilities for legislative recognition of the right. Firstly, the chapter considered whether the Commonwealth has the requisite legislative power to recognise the right. It was concluded that it is likely that the Commonwealth could successfully establish legislative power utilising the external affairs power. Three main options for Commonwealth legislative recognition were then discussed. Specifically, recognition of the right as an independent right within a statutory bill of rights, recognition as a derivative right under a statutory bill of rights, and recognition as an independent right under specific HRTHE legislation. Through this process, it was concluded that recognition of the right as an independent right within a statutory bill of rights based on the dialogue model is the most preferable form of recognition. This was justified on the basis that it would enable the right to be recognised within the context of other ESC rights, and would bypass the challenges associated with implied recognition. The options for state/territory legislative recognition were also considered. It was explained that the state and territory parliaments possess the legislative power to recognise the right, although the legislative power of the territories is subject to greater constraints. The same three options considered for Commonwealth legislative recognition were then considered for the states/territories, reaching the same conclusion that recognition of an independent HRTHE within the context of bills of rights legislation is the most preferable form of recognition.

Having identified the most preferable form of recognition, the chapter then turned to an evaluation of its ability to realise the potential benefits for environmental protection identified in Chapter Five. It was concluded that the proposed form of recognition is capable of realising a number of the identified benefits. However, despite this it was argued that the right is a limited tool for environmental protection. It was explained that some of these limitations relate to the nature of the proposed form of recognition, which by its nature is more limited than a constitutionally recognised HRTHE. Other limitations relate to the

broader socio-economic and political/legal context in which the right must operate. It was acknowledged that mandatory consideration of the right may have minimal impact on government decision-making given that in many instances the principles of ESD must already be taken into account for most environmental planning and management decisions, and the two concepts may have few points of differentiation in practice. The limited reach of the right was also identified as a limiting factor, as it is clear that the right can not be expected to address the myriad challenges facing the achievement of environmental protection in Australia.

However, it was emphasised that it is not necessary for the right to do so, as it is sufficient to warrant recognition if the right offers some possible benefits for environmental protection. It was further highlighted that the right appears to offer little guidance regarding the most effective mechanisms for its realisation. Whilst this may be an issue, it is also arguably beneficial for the right to allow for discretion in regards to the methods for its fulfilment. Finally, the possible 'dangers' associated with legislative recognition were addressed. It was acknowledged that the proposed form of recognition would result in a modified role for the judiciary. However, it was argued that the alleged dangers associated with the modified judicial role in the context of a constitutionally recognised right arguably do not apply in the context of a legislative right due to the limited judicial role under the dialogue model. Although it was recognised that the dialogue process may lead to unpredictable results, it was argued that such a possibility does not justify refusing recognition of the right as this is a risk with any form of rights recognition.

8.2.3 Overall conclusion in response to the thesis research question

In response to the overarching thesis research question, it was argued that international and domestic legal recognition of the HRTHE in Australia can be viewed as providing some potential benefits for environmental protection. It was concluded that although it is unlikely that the right would prove to be either redundant or dangerous in its operation, it is of limited utility as an additional mechanism for improving environmental protection in Australia. However, it was argued that the limited nature of the right should not be viewed as grounds for refusing recognition of the right, as it is not necessary to demonstrate that the right is the

'only or best approach' to environmental protection.[1] It is sufficient to warrant recognition if it can be demonstrated that it is a potentially useful additional and complementary approach.

The limitations of the right were attributed partly to the nature of the proposed form of recognition, and partly to the broader context in which the right must operate. As explained, a legislative HRTHE recognised under dialogue model bills of rights legislation requires consideration of the right in legislative, executive and judicial decision-making. However, unlike a constitutionally recognised right, a legislative HRTHE does not represent a significant challenge to the status quo. Under the proposed form of recognition, it would still be possible for the legislature to pass legislation incompatible with the right. Similarly, it would be possible for the executive to take the right into consideration, yet fail to make decisions in true consistency with the right. Whilst the judiciary would be empowered to interpret legislation as far as possible in consistency with the right and the purpose of the legislation, the extent to which this consideration would result in improved outcomes for environmental protection is a matter of debate. Having acknowledged these limitations it was argued that it is likely that the requirement to take the right into consideration by the three arms of government, and the possibility of scrutiny and review, could encourage a culture shift in government. It was noted earlier that this has occurred in other jurisdictions where the dialogue model has been adopted.

One of the right's greatest benefits may in fact lie in its ability to provide a 'hook' on which to hang arguments for increased environmental protection. As discussed, by couching environmental protection as a fundamental human interest deserving of protection by a right, calls for improved environmental protection can be strengthened. Duncan argues that it is problematic to conceptualise a healthy environment as a human right as 'the environment needs to be protected not for, but from, human beings'.[2] However, arguably one of the most effective ways to improve protection from human impacts is to characterise environmental

[1] Rodriguez-Rivera argues that criticisms of legal recognition of the right need to recognise that the adoption of a 'human rights approach to environmental protection and the elaboration of the substantive right to environment does not imply that it is the *only* or *best* approach for global environmental protection…': Luis E Rodriguez-Rivera, 'Is the Human Right to Environment Recognized Under International Law? It Depends on the Source' (2001) 12 (1) *Columbia Journal of International Environmental Law and Policy* 1, 32.
[2] Myrl L Duncan, 'The Rights of Nature: Triumph for Holism or Pyrrhic Victory?' (1991) 31 *Washburn Law Journal* 62, 68.

protection as a human interest. Historically, lack of appreciation of the link between human health and environmental health has hindered efforts to improve environmental protection. Moreover, the right's emphasis on ensuring equal access to environmental information and a healthy environment helps to focus attention on the need to improve environmental justice in Australia. The right's intergenerational aspects may also help to strengthen focus on consideration of the impacts of current practices on the enjoyment of the right by future generations. Although it is difficult to predict the needs of future generations in this regard, it is important that decision-making takes these interests into account.

However, it must be acknowledged that full realisation of the right could require significant structural changes that legal recognition of the right is not able to effect. The proposed legislative right is limited by this context, as it must work within a legal and political framework which accepts certain types of environmental harm. The extent to which the right is capable of impacting on this framework to achieve increased protection of the environment is contingent upon the form of recognition adopted, the degree of political and institutional support for its full realisation, and the extent and nature of opposition. Arguably, a constitutionally recognised HRTHE would be more capable of constituting a genuine challenge to the status quo than a legislative right. However, whether such a revision to the existing system is necessary or desirable is a matter of considerable debate.

Granting the judiciary greater power to invalidate legislation and executive decision-making allegedly violating the right would not necessarily be a positive outcome for environmental protection. It may be desirable in countries with inadequate legislative and executive decision-making processes, however in Australia such an expanded role for the judiciary in the determination of environmental disputes is arguably not required. Moreover, it could result in inappropriate interference with the law and policy-making roles of the political arms of government. Accordingly, the proposed legislative form of the right can be viewed as a desirable compromise which allows for recognition of the right whilst avoiding the potential 'dangers' associated with constitutional recognition.

8.3 Significance of the research

As explained in Chapter One, the thesis aims to contribute to three key gaps in the relevant bodies of literature. Namely, practical implementation of rights-based approaches to environmental protection, the application of rights-based approaches to environmental protection in Australia, and the application of rights-based approaches to water management in Australia. Rather than focusing on the theoretical justifications and legal status of the right, the thesis sought to evaluate the possible consequences associated with practical implementation of the right in the Australian context. The scholarship concerning environmental rights generally and the HRTHE specifically, tends to focus on these broader issues. In contrast, this thesis aimed to move past this debate, in order to assess how the right could be recognised at the international level and under domestic law, and how such recognition could benefit environmental protection in Australia. Through this process, the research contributed to two important areas in need of further research within the human rights and the environment literature. Specifically, elucidation of the potential content of the right under international law, and the need for authoritative guidance to be provided in order to assist in the development of human rights indicators to assess progress towards realisation of the right.

The research also contributed to addressing the second identified gap in the literature – application of rights-based approaches to environmental protection in Australia. Whilst there has been limited academic commentary regarding the possibility of recognising some form of environmental rights in Australia, there has been no extended academic analysis of the application of rights-based approaches to environmental protection. Given the growing jurisprudence and literature on environmental rights globally, this is a significant omission. It is hoped that this thesis has contributed a useful starting point for further academic discussion on this issue. In particular, by putting forward a potential explanation for Australia's reluctance to join the environmental rights revolution it may help to identify ways of crafting a rights-based approach that is appropriate and acceptable in the Australian context.

Finally, the thesis addressed the application of rights-based approaches to water resources management in Australia. The literature on water law and policy in Australia focusses quite heavily on the implementation of the Commonwealth Government's national water law reforms and the management of the Murray-Darling Basin. Although there has been some

academic consideration of the potential application of a rights-based approach to Australian water management, it has largely been restricted to discussion of the human right to water. Accordingly, by considering the potential interaction of legal recognition of the HRTHE with water management in the MDB, the thesis contributes to an under examined area within the literature.

8.4 Limitations and areas for further research

The research is limited in various ways. Firstly, in terms of addressing the thesis question, consideration of both the options for legal recognition and the potential benefits for environmental protection were limited in scope. The thesis adopted a specific definition of 'benefit' for environmental protection, and did not comprehensively consider all potential legal recognition options at both the international and domestic levels. Rather than considering all of the potential benefits which could possibly be associated with domestic legal recognition of the right, the thesis was restricted to consideration of the potential realisation of a specific set of potential benefits which have been realised through legal recognition in other jurisdictions. Similarly, rather than considering all of the potential domestic legal recognition options in depth, the analysis focused on examination of the realisation of the identified potential benefits under two specific forms of domestic legal recognition. Furthermore, instead of considering how realisation of these benefits could be utilised to address all of Australia's vast and varied environmental protection challenges, the thesis concentrated on a case study of the possible realisation of the benefits in one specific environmental protection context (water resources management, specifically in the MDB). Even within this case study area, the thesis scope was limited to consideration of the potential impacts on two issue areas; sustainable water resources management and water quality and pollution management.

The use of the case study was not intended to provide a comprehension exploration of the potential impact of the right in the case study context. Rather, illustrative examples of the right's potential operation in the water management context were utilised to demonstrate how the general potential benefits could be realised through the forms of legal recognition considered. Until the content of the right is known, it is not possible to comprehensively ascertain the precise impact of the right in specific contexts. Accordingly, there is significant scope for future research. This research has hopefully provided as a starting point for further discussion regarding other potential environmental protection benefits associated with recognition, the advantages/disadvantages associated with alternative legal recognition options, and the impacts that those options may have in different environmental protection contexts. For instance, once the content of the right has been ascertained, it would be useful to ascertain the extent to which the potential general benefits outlined may be able to be realised in other contexts, such as the biodiversity conservation, climate change, and forestry management contexts. It is possible that the right may have greater or less utility in these

different contexts, and for this reason the general utility of the right as a tool for environmental protection should not be overstated.

A second important area of limitation relates to the subjective judgements made during the course of the research. As acknowledged, there is significant debate regarding the identification of environmental challenges, the efficacy and desirability of possible responses, and the aims of environmental protection generally. Accordingly, the identified benefits may not enjoy universal recognition as benefits for environmental protection in the Australian context. Further research will hopefully critically engage with this issue, and explore other ways in which the right may be of use as a tool for environmental protection. Similarly, various aspects of the legal analysis are open to interpretation. In particular, the interpretation of the HRTHE as an implied right under the Covenant, and the identification of the potential content and obligations imposed by the right are both open to interpretative debate. Further scholarly discussion addressing the source and potential content of the right is necessary, in order to help inform discussions about how the right may be operationalised in practice.

A third limitation concerns the nature of the methodological approach adopted. Ideally, future research will build upon the discussions in this research, by engaging in qualitative research seeking to gauge the opinions of individuals and groups working in the environmental protection field who are best placed to evaluate the potential impact of the right on existing systems for environmental protection.

8.5 Conclusion

In an age of climate change and global decline in ecological health, it is crucial that the law develops innovative and effective ways of responding to key environmental protection challenges. Rights-based approaches to environmental protection offer an alternative way of thinking about the human/environment relationship, and may be utilised as additional tools to help improve protection of the natural environment. Across the world, expressions of popular will are resulting in the legal recognition of environmental rights. Although this environmental rights revolution has thus far failed to take hold in Australia, it is the contention of this thesis that Australia should give serious consideration to the adoption of a rights-based approach. In particular, Australia should consider enacting federal and state/territory legislative bills of rights based on the dialogue model, recognising an independent human right to a healthy environment.

It was recognised that federal recognition of a statutory bill of rights is unlikely at present, and that recognition of ESC rights and the HRTHE in particular may prove particularly contentious. However, it was argued that despite this it is important to discuss potential alternative approaches to environmental protection, even if they may not be considered as policy options in the near future. The right to a healthy environment can be viewed as a pre-requisite right to the realisation of all other human rights, as human life cannot be sustained in a degraded and ecologically imbalanced environment. It is hoped that the legal status, scope and content of the right at the international level will be clarified by an authoritative body in the near future, in order to facilitate informed discussion of the obligations imposed by the right and its potential application in domestic contexts.

References

Articles/Books/Reports

ACT Economic, Social and Cultural Rights Research Project, *ACT Economic, Social and Cultural Rights Research Project Report* (2010) <http://acthra.anu.edu.au/documents/ACTESCR_project_final_report.pdf>

ACT Human Rights Act Research Project (ANU), *The Human Rights Act 2004 (ACT): The First Five Years of Operation* (2009) <cdn.justice.act.gov.au/resources/uploads/JACS/ACT_Government_s_43_Review_Report.pdf>

Akchurin, Maria, 'Constructing the Rights of Nature: Constitutional Reform, Mobilization, and Environmental Protection in Ecuador' (2015) 40 (4) *Law & Social Inquiry* 937

Alston, Philip, 'Conjuring Up New Human Rights: A Proposal for Quality Control' (1984) 78 (3) *The American Journal of International Law* 607

Anderson, Michael, 'Human Rights Approaches to Environmental Protection: An Overview' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press, 1998) 1

Anderson, Paul, *Reforming Law and Economy for a Sustainable Earth: Critical Thought for Turbulent Times* (Routledge, 2015)

Anton, Donald K, and Dinah L Shelton, *Environmental Protection and Human Rights* (Cambridge University Press, 2011)

Appleby, Gabrielle, 'Proportionality and Federalism: Can Australia learn from the European Community, the US and Canada?' (2009) 26 (1) *University of Tasmania Law Review* 1

Atapattu, Sumudu, 'The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law' (2002) 16 *Tulane Environmental Law Journal* 65

Australian Bureau of Statistics, *Information Paper: Towards the Australian Environmental-Economic Accounts* (2013) <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4655.0.55.002Main%20Features

42013?opendocument&tabname=Summary&prodno=4655.0.55.002&issue=2013&num=&view=>

Australian Government Department of Agriculture and Water Resources, *Report of the Independent Review of the Water Act 2007 Australian Government Response* (2015) <http://www.environment.gov.au/system/files/resources/6b4a93b6-e3ac-4efa-8b10-f16dbe1a4d45/files/government-response-water-act-review.pdf>

Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (ALRC Interim Report 127)* (2015) <https://www.alrc.gov.au/publications/alrc127>

Bellamy, Jennifer, Helen Ross, Sarah Ewing and Tony Meppem, *Integrated Catchment Management: Learning from the Australian Experience for the Murray-Darling Basin: Overview Report* (2002) <http://www2.mdbc.gov.au/__data/page/911/ICM_Learning_from_Australian_Experience.pdf>

Bielefeldt, Heiner, 'Philosophical and Historical Foundations of Human Rights' in Catarina Krause and Martin Sheinin (eds), *International Protection of Human Rights: A Textbook* (Åbo Akademi University Institute for Human Rights, 2009) 3

Bonyhady, Tim, 'Putting the Environment First?' (2012) 29 *Environmental and Planning Law Journal* 316

Boyd, David R, 'Constitutions, Human Rights, and the Environment: National Approaches' in Anna Grear and Louis J Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar, 2015), 170-199.

Boyd, David R, *The Importance of Constitutional Recognition of the Right to a Healthy Environment: Executive Summary* (2013) 9-12 <http://davidsuzuki.org/publications/2013/11/DSF%20White%20Paper%201--2013.pdf>

Boyd, David R, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (UBC Press, 2012)

Boyd, David R, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (UBC Press, 2012)

Boyle, Alan, 'Human Rights and the Environment: Where Next?' (2012) 23 (3) *The European Journal of International Law* 613

Boyle, Alan, ‘Human Rights and the Environment: A Reassessment’ (2010) 1 <http://www.unep.org/environmentalgovernance/Portals/8/documents/Events/HumanRightsEnvironmentRev.pdf>

Boyle, Alan, 'The Role of International Human Rights Law in the Protection of the Environment' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press, 1998) 43

Brandis, George, 'The Debate We Didn't Have to Have: The Proposal for An Australian Bill of Rights' (2008) 15 *James Cook University Law Review* 24

Brennan, Gerard, 'The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Perspective' in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford University Press, 1999) 454

Bruckerhoff, Joshua J, 'Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights' (2008) 86 (3) *Texas Law Review* 615

Peter D Burdon, ‘Environmental Human Rights: A Constructive Critique’ in Anna Grear and Louis J Kotzé (eds) *Research Handbook on Human Rights and the Environment* (Edward Elgar Publishing, 2015) 61

Burdon, Peter, 'Environmental Protection and the Limits of Rights Talk' (2012) <http://rightnow.org.au/topics/environment/environmental-protection-and-the-limits-of-rights-talk/>

Byrnes, Andrew, Hilary Charlesworth and Gabrielle McKinnon, *Bill of Rights in Australia: History, Politics and Law* (UNSW Press Ltd, 2009)

Cahill-Ripley, Amanda, *The Human Right to Water and its Application in the Occupied Palestinian Territories* (Routledge, 2011)

Callinan, I D F, and Amanda Stoker, ‘Politicizing the Judges: Human Rights Legislation’ (2011) 30 *University of Queensland Law Journal* 1 55

Campbell, Tom, 'Does Anyone Win under a Bill of Rights?: A Response to Hilary Charlesworth's 'Who Wins under a Bill of Rights?" (2006) 25 (1) *The University of Queensland Law Journal* 55

Campbell, Tom, *Rights: A Critical Introduction* (Routledge, 2006)

Cantley-Smith, Rowena, 'A Human Right to a Healthy Environment' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters, 2013) 447

Carruthers, Penny and Sharon Mascher, 'The Story of Water Management in Australia: Balancing Public and Private Property Rights to Achieve a Sustainable Future' (2011) 1 *Property Law Review* 97

Collins, Lynda Margaret, 'Are We There Yet? The Right to Environment in International and European Law' (2007) 3 (2) *McGill International Journal Sustainable Development Law & Policy* 119

Commonwealth of Australia, *Report of the Independent Review of the Water Act 2007, Commonwealth of Australia 2014* (2014) <http://www.environment.gov.au/system/files/independent-review-water-act-2007.pdf>

Conca, Ken, 'Environmental Human Rights: Greening "The Dignity and Worth of the Human Person"' in Peter Dauvergne (ed), *Handbook of Global Environmental Politics* (Edward Elgar, 2nd ed, 2012) 403

Connell, Daniel, 'Section 100 – a Barrier to Environmental Reform?' (2003) 8 (2) *Australasian Journal of Natural Resources Law and Policy* 83

Crase, Lin, Suzanne O'Keefe and Brian Dollery, 'Presumptions of Linearity and Faith in the Power of Centralised Decision-Making: Two Challenges to the Efficient Management of Environmental Water in Australia' (2012) 56 *Australian Journal of Agricultural and Resource Economics* 426

Craven, Greg, 'Reflections on Judicial Activism: More in Sorrow than in Anger' (Paper presented at the Upholding the Australian Constitution, Perth, Western Australia, 1997) <http://www.samuelgriffith.org.au/papers/html/volume9/v9chap9.htm>

Curran, Giorel, & Robyn Hollander, '25 Years of Ecologically Sustainable Development in Australia: Paradigm Shift or Business as Usual?' (2015) 22 (1) *Australasian Journal of Environmental Management* 2

Dahlman, Christian, 'The Function of Opinio Juris in Customary International Law' (2012) *Nordic Journal of International Law* 327

Daly, Erin, and James R. May, 'Comparative environmental constitutionalism' (2015) 6 *Jindal Global Law Review* 9

Darrow, Mac, and Philip Alston, 'Bill of Rights in Comparative Perspective' in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford University Press, 1999) 465

de Beco, Gauthier, 'Human Rights Indicators for Assessing State Compliance with International Human Rights' 77 *Nordic Journal of International Law* 23

Department of Economic and Social Affairs, United Nations Secretariat, *Indicators of Sustainable Development: Guidelines and Methodologies* (3rd ed, 2007) <http://www.un.org/esa/sustdev/natlinfo/indicators/guidelines.pdf>

Department of the Prime Minister and Cabinet (Cth), *Reform of the Federation: White Paper* (2014) <https://federation.dpmc.gov.au/sites/default/files/issues-paper/issues_paper1_a_federation_for_our_future.rtf>

Downs, Jennifer A, 'A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right' (1993) 3 *Duke Journal of Comparative & International Law* 351

Draft Declaration of Principles on Human Rights and the Environment, Fatma Zohra Ksentini, Special Rapporteur, UN Doc E/CN.4/Sub.2/1994/9 (1994) annex 1

Dresner, Simon, *The Principles of Sustainability* (Earthscan, 2009)

Duncan, Myrl L, 'The Rights of Nature: Triumph for Holism or Pyrrhic Victory?' (1991) 31 *Washburn Law Journal* 62

Easterbrook, Frank H, 'Do Liberals and Conservatives Differ in Judicial Activism?' (2002) 73 *University of Colorado Law Review* 1401

Eastman, Kate, 'Australia's Engagement with the United Nations' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters, 2013) 96

Edgar, Andrew, 'Extending Standing – Enhanced Accountability? Judicial Review of Commonwealth Environmental Decisions' (2011) 39 (3) *Federal Law Review* 435

Edson, Elise, 'Section 51 (xxix) of the *Australian Constitution* and 'Matters of International Concern': Is There Anything to be Concerned About?' (2008) 29 *Adelaide Law Review* 269

Elder, P S, 'Legal Rights for Nature - The Wrong Answer to the Right(s) Question' (1984) 22 (2) *Osgoode Hall Law Journal* 285

Ettinger, Albert, ‘Water Pollution, Agriculture, and the Law (or Lack of Law)’ (Paper presented at the 2009 Governor's Conference on the Management of the Illinois River System 'Looking Back, Moving Forward', October 20-22, 2009) <http://ilrdss.sws.uiuc.edu/pubs/govconf2009/Plenary2/Ettinger.pdf>

Eurick, Janelle P, 'The Constitutional Right to a Healthy Environment: Enforcing Environmental Protection Through State and Federal Constitutions' (1999-2001) 11 *International Legal Perspectives* 185

Fisher, D E, *Water Law* (LBC Information Services, 2000)

French, Robert, ‘Judicial Activism – The Boundaries of the Judicial Role’ (Paper presented at Lawasia Conference, Ho Chi Minh City, Vietnam, 10 November 2009) 7 <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj10Nov09.pdf>

Fung, Melissa, 'The Right to a Healthy Environment: Core Obligations Under the International Covenant of Economic, Social and Cultural Rights' (2006) 14 *Willamette Journal of International Law and Dispute Resolution* 97

Galligan, Brian, and F L Morton, 'Australian Exceptionalism: Rights Protection Without a Bill of Rights' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance in Australia* (Ashgate Publishing, 2006) 17

Gardner, Alex, Richard Bartlett and Janice Gray, *Water Resources Law* (LexisNexis Butterworths, 2009)

Gellers, Joshua C, ‘Explaining the Emergence of Constitutional Environmental Rights: A Global Quantitative Analysis’ 6 (1) *Journal of Human Rights and the Environment* 75

Gerstein, J M, D J Lewis, K Rodrigues, J M Harper, J Kabashima, *State and Federal Approach to Control of Nonpoint Sources of Pollution* (2006) University of California Agriculture and Natural Resources Communication Services Publication 8203 <http://anrcatalog.ucdavis.edu/pdf/8203.pdf>

Gibbs, Harry, ‘Does Australia Need a Bill of Rights?’ (Paper presented at the Sixth Conference of The Samuel Griffith Society, Carlton, 17-19 November 1995) <http://www.samuelgriffith.org.au/papers/html/volume6/v6chap7.htm>

Godden, Lee, Jacqueline Peel and Lisa Caripis, 'Commonwealth Should Keep Final Say on Environment' (2012) <http://theconversation.com/commonwealth-should-keep-final-say-on-environment-protection-11047>

Godden, Lee, and Jacqueline Peel, *Environmental Law: Scientific, Policy and Regulatory Dimensions* (Oxford University Press, 2009)

Godden, Lee, and Jacqueline Peel, 'The *Environment Protection and Biodiversity Conservation Act 1999* (Cth): Dark Sides of Virtue' (2007) 31 *Melbourne University Law Review* 106

Goldsworthy, Jeffrey, 'Introduction' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate Publishing, 2006) 2

Good, Meg, 'Water Pollution: Treated Seriously, or Seriously in Need of Treatment?' (2014) 113 *Precedent* 23

Good, Meg, 'The River as a Legal Person: Evaluating Nature Rights Approaches to Environmental Protection in Australia' (2013) 1 *National Environmental Law Review* 34

Good, Meg, 'Implementing the Human Right to Water in Australia' (2011) 30 (2) *University of Tasmania Law Review* 107

Gunningham, Neil, and Darren Sinclair, 'Policy Instrument Choice and Diffuse Source Pollution' (2005) 17 (1) *Journal of Environmental Law* 51

Gunningham, Neil, and Darren Sinclair, 'Designing Smart Regulation' in Bridget M Hutter (ed), *A Reader in Environmental Law* (Oxford University Press, 1999) 305

Handl, Günther, 'Human Rights and Protection of the Environment: A Mildly "Revisionist" View' in Antonio Augusto Cancado Trindade (ed), *Human Rights, Sustainable Development and the Environment* (Instituto Interamericano de Derechos Humanos and Banco Interamericano de Desarrollo, 1992) 117

Hayward, Tim, *Constitutional Environmental Rights* (Oxford University Press, 2005)

Hill, Barry E, Steve Wolfson and Nicholas Targ, 'Human Rights and the Environment: A Synopsis and Some Predictions' (2003-2004) 16 *Georgetown International Environmental Law Review* 359

Hiskes, Richard P, *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice* (Cambridge University Press, 2009)

Hiskes, Richard P, 'The Right to a Green Future: Human Rights, Environmentalism, and Intergenerational Justice' (2005) 27 *Human Rights Quarterly* 1346

Holley, Cameron and Darren Sinclair, 'Governing Water Markets: Achievements, Limitations and the Need for Regulatory Reform' (2016) 33 *Environmental and Planning Law Journal* 301

Huffman, James L, 'Do Species and Nature Have Rights?' (1992) 13 *Public Land Law Review* 51

Hutter, Bridget M, 'Socio-legal Perspectives on Environmental Law: An Overview' in Bridget M Hutter (ed), *A Reader in Environmental Law* (Oxford University Press, 1999) 3

Irving, Helen, 'The Dilemmas in Dialogue: A Constitutional Analysis of the NHRC's Proposed Human Rights Act' (2010) 33 (1) *UNSW Law Journal* 60

Jeffords, Christopher, 'Constitutional Environmental Human Rights: A Descriptive Analysis of 142 National Constitutions' in Lanse Minkler (ed), *The State of Economic and Social Human Rights: A Global Overview* (Cambridge University Press, 2013) 329

Jodoin, Sebastien, 'Should We Be So Positive About Environmental Rights: A Review of David R Boyd's The Environmental Rights Revolution' (2012-2013) 8 *McGill International Journal of Sustainable Development Law and Policy* 131

Johns, Carolyn M, *Effective Policy Regimes for the Management of Non-point Source Water Pollution: Ontario and the US in Comparative Perspective* (2001) <https://ozone.scholarsportal.info/bitstream/1873/8143/1/10294253.pdf>

Joseph, Sarah, and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Thomson Reuters, 3rd ed, 2010)

Kalantry, Sital, Jocelyn E Getgen and Steven Arrigg Koh, 'Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR' (2010) 32 *Human Rights Quarterly* 253

Keyzer, Patrick, *Constitutional Law* (LexisNexis Butterworths, 2nd ed, 2005)

Kildea, Paul, and George Williams, 'The Constitution and the Management of Water in Australia's Rivers' (2010) 32 *Sydney Law Review* 595

Kildea, Paul, 'The Bill of Rights Debate in Australian Political Culture' (2003) 9 (1) *Australian Journal of Human Rights* 7

Kirby, Michael, 'Protecting Human Rights in Australia Without a Charter' (2011) 37 (2) *Commonwealth Law Bulletin* 255

Kirby, Michael, 'National Human Rights Framework Developments' (2010) 52 *Human Rights Law Resource Centre Bulletin* <www.hrlc.org.au/files/HRLRC-Bulletin-08.10.doc>

Kirby, Michael, 'Judicial Activism: Power Without Responsibility? No, Appropriate Activism Conforming to Duty' (2006) 30 *Melbourne University Law Review* 576

Kmiec, Keenan D, 'The Origin and Current Meanings of Judicial Activism' (2004) 92 (5) *California Law Review* 1441

Knox, John, Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc A/HRC/28/61/Add.1 (6 March 2015) annex ('*Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment on his Mission to France (20-24 October 2014)'*)

Knox, John, Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc A/HRC/25/53/Add.1 (8 April 2014) annex ('*Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment on his Mission to Costa Rica (28 July – 1 August 2013)'*)

Lee, John, 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law' (2000) 25 *Columbia Journal of Environmental Law* 283

Lester, Rebecca, 'Coorong Recovery Begins, but Still Room for Improvement' (2012) *The Conversation* <https://theconversation.com/coorong-recovery-begins-but-still-room-for-improvement-5810>

Lewis, Bridget, 'Environmental Rights or a Right to the Environment? Exploring the Nexus Between Human Rights and Environmental Protection' 8 (1) *Macquarie Journal of International and Comparative Environmental Law* 36

Lyster, Rosemary, Zada Lipman, Nicola Franklin, Graeme Wiffen and Linda Pearson, *Environmental and Planning Law in New South Wales* (Federation Press, 2009)

Macintosh, Andrew, ‘The Impact of ESD on Australia’s Environmental Institutions’ (2015) 22 (1) *Australasian Journal of Environmental Management* 33

Macintosh, Andrew, ‘Why the Environment Protection and Biodiversity Conservation Act’s Referral, Assessment and Approval Process is Failing to Achieve its Environmental Objectives’ (2004) 21 (4) *Environmental and Planning Law Journal* 288

Margil, Mari, 'Stories from the Environmental Frontier' in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011) 249

Marshall, William P, 'Conservatives and the Seven Sins of Judicial Activism' (2002) 73 *University of Colorado Law Review* 1217

May, James R, and Erin Daly, *Global Environmental Constitutionalism* (Cambridge University Press, 2015)

May, James R, and Erin Daly, 'Vindicating Fundamental Environmental Rights Worldwide' (2009) 11 *Oregon Review of International Law* 365

May, James R, ‘Constituting Fundamental Environmental Rights Worldwide’ (2006) 23 (1) *Pace Environmental Law Review* 113

McGrath, Chris, ‘Coalition’s Environmental One-Stop Shop is Falling Apart’ (2014) *The Conversation* <https://theconversation.com/coalitions-environmental-one-stop-shop-is-falling-apart-30965>

McGrath, Chris, *Does Environmental Law Work? How to Evaluate the Effectiveness of an Environmental Legal System* (Lambert Academic Publishing, 2010)

McGrath, Chris ‘Swirls in the Stream of Australian Environmental Law: Debate on the EPBC Act’ (2006) 23 (3) *Environmental and Planning Law Journal* 165

McKenna, Mark, 'The Need for a New Preamble to the Australian Constitution and/or a Bill of Rights' (Parliament of Australia, 1996-97) <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9697/97rp12>

McKenzie, Michael, ‘Water Rights in NSW: Properly Property?’ (2009) 31 *Sydney Law Review* 443

McNitt, Andrew D, ‘Some Thoughts on the Systematic Measurement of the Abuse of Human Rights’ in David Louis Cingranelli (ed), *Human Rights: Theory and Measurement* (1988) 89

Meagher, Dan, ‘The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and the Courts’ (2014) 42 *Federal Law Review* 1

Meier, Benjamin Mason, Jocelyn Getgen Kestenbaum, Georgia LYN Kayser, Urooj Quezon Amjad and Jamie Bartram, ‘Examining the Practice of Developing Human Rights Indicators to Facilitate Accountability for the Human Right to Water and Sanitation’ (2014) *Journal of Human Rights Practice* 159

Merrills, J G, 'Environmental Protection and Human Rights: Conceptual Aspects' in Alan E Boyle and Michael R Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press, 1998) 25

Meyerson, Denise, *Jurisprudence* (Oxford University Press, 2011)

Mitchell, Andrew, and Jennifer Beard, *International Law in Principle* (Thomson Reuters, 2009)

Moeller, Anthony, and Jennifer McKay, 'Is there Power in the Australian Constitution to Make Federal Laws for Water Quality?' (2000) 17 (4) *Environmental and Planning Law Journal* 294

Morgan, Jenny, 'A Constitutional Right to (Gender) Equality: What's the Difference?' in Glenn Patmore and Gary Jungwirth (eds), *The Big Makeover: A New Australian Constitution* (Pluto Press, 2002) 166

Nash, James A, 'The Case for Biotic Rights' (1993) 18 *Yale Journal of International Law* 235

National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009) <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter15#_ftnref9>

National Water Commission, *Australia’s Water Blueprint: National Reform Assessment 2014* (2014) <http://www.nwc.gov.au/publications/topic/assessments/australias-water-blueprint-national-reform-assessment-2014>

National Water Commission, *Australian Water Markets Report 2012-13* (2013) <http://www.nwc.gov.au/publications/topic/water-industry/australian-water-markets-report-2012-13>

National Water Commission, *The National Water Initiative – Securing Australia's Water Future: 2011 Assessment* (2011) <http://nwc.gov.au/publications/topic/assessments/ba-2011/executive-overview#sec-a-p3>

National Water Commission, *Water Markets in Australia: A Short History* (2011) <http://www.nwc.gov.au/__data/assets/pdf_file/0004/18958/Water-markets-in-Australia-a-short-history.pdf>

Nelson, Rebecca, 'Regulating Nonpoint Source Pollution in the US: A Regulatory Theory Approach to Lessons and Research Paths for Australia' (2011) 35 *University of Western Australia Law Review* 340

Nickel, James W, 'The Human Right to a Safe Environment: Philosophical Perspectives on Its Scope and Justification' (1993) 18 *Yale Journal of International Law* 281

O'Connor, Patrick, Paul Dalby and Annie Bond, *A Review of Community Based Monitoring in the South Australian Murray-Darling Basin* (2005) SA Murray-Darling Basin Integrated Natural Resource Management Group Inc <http://www.samdbnrm.sa.gov.au/Portals/9/PDF's/People/Review%20of%20Community%20Based%20NRM%20Monitoring%20SAMDB.pdf>

Office of the United Nations High Commissioner for Human Rights and United Nations Environment Programme, *Human Rights and the Environment, Rio+20: Joint Report OHCHR and UNEP* (2012) <http://www.unep.org/delc/Portals/119/JointReportOHCHRandUNEPonHumanRightsandtheEnvironment.pdf>

Office of the United Nations High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation* (2012) 31 <http://www.ohchr.org/Documents/Issues/HRIndicators/AGuideMeasurementImplementationCover_en.pdf>

Office of the United Nations High Commissioner for Human Rights, *Report on Indicators for Promoting and Monitoring the Implementation of Human Rights*, UN Doc HRI/MC/2008/3 (6 June 2008)

Ozdowski, Sev, 'Human Rights – A Challenge for Australia' (Speech delivered at National Press Club, Sydney, 6 February 2002)

<http://www.humanrights.gov.au/news/speeches/human-rights-challenge-australia-dr-sev-ozdowski-2002>

Pannell, David J, and Anna M Roberts, 'Australia's National Action Plan for Salinity and Water Quality: a Retrospective Assessment' (2010) 54 *Australian Journal of Agricultural and Resource Economics*

Parliament of Victoria, *Charter Review Report* (2011) <http://www.parliament.vic.gov.au/sarc/article/1446>

Perez, Michelle, *Regulating Farm Non-Point Source Pollution: The Inevitability of Regulatory Capture and Conflict of Interest?* (2011) 9 Stockholm International Water Institute <http://www.siwi.org/documents/Resources/Best/2010/2011_OTWF_Michelle_Perez.pdf>

Pillai, Sangeetha and George Williams, 'Commonwealth Power and Environmental Management: Constitutional Questions Revisited' (2015) 32 *Environmental and Planning Law Journal* 395

Pinter, Laszlo, *Measuring Progress Towards Sustainable Development Goals: Working Paper* (2013) International Institute for Sustainable Development, 8 <http://www.iisd.org/pdf/2013/measuring_progress_sus_dev_goals.pdf>

Preston, Brian J, 'Enforcement of Environmental and Planning Laws in New South Wales' (Paper presented at the Law and Sustainability Symposium, University of Southern Queensland Law School, Brisbane, 11 March 2011) <http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Enforcement_of_Environmental_and_Planning_Laws_in_New_South_Wales_v_2_(Lawbook_Co_citation_style).pdf/$file/Enforcement_of_Environmental_and_Planning_Laws_in_New_South_Wales_v_2_(Lawbook_Co_citation_style).pdf>

Preston, Brian, 'Water and Ecologically Sustainable Development in the Courts' (2009) 6 *Macquarie Journal of International and Comparative Environmental Law* 129

Redgwell, Catherine, 'Life, the Universe and Everything: A Critique of Anthropocentric Rights' in Alan E Boyle and Michael R Anderson (eds), *Human Rights to Approaches to Environmental Protection* (Clarendon Press, 1998) 71

Richardson, Benjamin J, 'Book Review: The Right to a Healthy Environment: Revitalizing Canada's Constitution; The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment' (2013) 179 *British Columbia Quarterly* 241

Richardson, Lucy, 'Economic, Social and Cultural Rights (and Beyond) in the UN Human Rights Council' (2015) 15 *Human Rights Law Review* 409

Roaf, Virginia, 'Initial Development of Indicators for the Right to Water and Sanitation' in Sabine Hoffman, *The Implementation of the Right to Water and Sanitation in Central and Eastern Europe* (2006) 7 <http://www.awhhe.am/downloads/publications/Paper-english.pdf>

Roaf, Virginia, Ashfaq Khalfan and Malcolm Langford, 'Monitoring Implementation of the Right to Water: A Framework for Developing Indicators' (2005) *Global Issue Papers* <http://www.worldwatercouncil.org/fileadmin/wwc/Programs/Right_to_Water/Pdf_doct/Monitoring_implementation_of_the_RTW_Indicators.pdf>

Roberts, A M, and R K Craig, 'Regulatory Reform Requirements to Address Diffuse Source Water Quality Problems in Australia: Learning from US Experiences' (2014) 21 (1) *Australasian Journal of Environmental Management* 1

Rodriguez-Rivera, Luis E, 'Is the Human Right to Environment Recognized Under International Law? It Depends on the Source' (2001) 12 (1) *Columbia Journal of International Environmental Law and Policy* 1

Rosga, AnnJanette, and Margaret L Satterthwaite, 'The Trust in Indicators: Measuring Human Rights' (2009) 27 (2) *Berkeley Journal of International Law* 253

Scheinin, Martin, 'International Mechanisms and Procedures for Monitoring' in Catarina Krause and Martin Sheinin (ed), *International Protection of Human Rights: A Textbook* (Åbo Akademi University Institute for Human Rights, 2009) 601

Scrutiny of Acts and Regulations Committee (Vic), *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) <http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/report_response/20110914_sarc.charterreviewreport.pdf>

Senate Environment and Communications Legislation Committee, Parliament of Australia, *National Water Commission (Abolition) Bill 2014 Report* (2014)

Sennett, Amy, Emma Chastain, Sarah Farrell, Tom Gole, Jasdeep Randhawa and Chengyan Zhang, *Challenges and Responses in the Murray-Darling Basin* (2014) 16 *Water Policy* 117

Shaw, Malcolm N, *International Law* (Cambridge University Press, 7th ed, 2014)

Shelton, Dinah L (ed), *Human Rights and the Environment Volume I* (Edward Elgar, 2011)

Dinah Shelton, ‘Equitable Utilization of the Atmosphere: a Rights-Based Approach to Climate Change?’ in Stephen Humphreys (ed), *Human Rights and Climate Change* (Cambridge University Press, 2010) 91

Shelton, Dinah, *Human Rights and Environment: Past, Present and Future Linkages and the Value of a Declaration* (2009) Background Paper (Draft), High Level Expert Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward, Nairobi, 30 November – 1 December 2009

Shestack, Jerome J, 'The Philosophical Foundations of Human Rights' in Janusz Symonides (ed), *Human Rights: Concepts and Standards* (Ashgate, Gower & Lund Humphries Publishing, 2000) 33

Singer, Peter, ‘Speciesism and Moral Status’ (2009) 40 (3/4) *Metaphilosophy* 567

Skinner, Dominic, and John Langford, ‘Legislating for Sustainable Basin Management: The Story of Australia’s Water Act’ (2007) 15 *Water Policy* 871

State of the Environment 2011 Committee, *In Brief The Australian Environment in 2011* <http://www.environment.gov.au/science/soe/2011-inbrief/australian-environment#ib1>

Stein, Paul, ‘Are Decision-Makers Too Cautious with the Precautionary Principle?’ (2000) 17 *Environmental and Planning Law Journal* 3

Stoeckel, Kate, Romany Webb, Luke Woodward and Amy Hankinson, *Australian Water Law* (Thomson Reuters, 2012)

Stone, Bruce, and Nicholas Barry, ‘Constitutional Design and Australian Exceptionalism in the Adoption of National Bills of Rights’ (2014) 47 (4) *Canadian Journal of Political Science* 767

Stone, Christopher, 'Response to Commentators' (2012) 3 *Journal of Human Rights and the Environment* 100

Stone, Christopher D, *Should Trees Have Standing? Law, Morality, and the Environment* (Oxford University Press, 5th ed, 2010)

Stone, Geoffrey R, '*Citizens United* and Conservative Judicial Activism' (2012) 2 *University of Illinois Law Review* 485

Tasmania Law Reform Institute, *A Charter of Rights for Tasmania* (2007) <http://www.utas.edu.au/__data/assets/pdf_file/0003/283728/Human_Rights_A4_Final_10_Oct_2007_revised.pdf>

Tate, Pamela, ‘Human Rights in Australia: What Would a Federal *Charter of Rights* Look Like?’ (2009-10) 13 *Southern Cross University Law Review* 1

Taylor, Prudence E, 'From Environmental to Ecological Human Rights: A New Dynamic in International Law?' (1998) 10 (2) *Georgetown International Environmental Law Review* 309

The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1998) 20 *Human Rights Quarterly* 691

Thio, Li-Ann, ‘The Universal Declaration of Human Rights at 60: Universality, Indivisibility and the Three Generations of Human Rights’ (2009) 21 (1) *Singapore Academy of Law Journal* 293

Tridgell, Susan, ‘Evaluating the Effectiveness of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth): 2008-2012’ (2013) 30 (3) *Environmental and Planning Law Journal* 245

Twomey, Anne, ‘Inconsistency Between Commonwealth and Territory Laws’ (2014) 42 (3) *Federal Law Review* 421

Twomey, Anne, 'ACT Law Delivers Neither Marriage nor Equality: the High Court's Verdict' (2013) <http://theconversation.com/act-law-delivers-neither-marriage-nor-equality-the-high-courts-verdict-21406>

United Nations Environment Programme, *Global Environment Outlook 5 Assessment Full Report: Environment for the Future We Want* (2012) <http://www.unep.org/geo/geo5.asp>

United Nations Human Rights Office of the High Commissioner, *What Are Human Rights?* (2015) <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>

United Nations Independent Expert on Human Rights and the Environment with the United Nations Environment Programme, the Office of the High Commissioner for Human Rights, and the Legal Resources Centre of South Africa, *Human Rights and the Environment: Regional Consultation on the Relationship Between Human Rights Obligations and Environmental Protection, with a Focus on Constitutional Environmental Rights* (2014) 23-24 January 2014, Johannesburg, South Africa <http://srenvironment.org/wp-content/uploads/2014/11/Johannesburg-consultation-report-final.pdf>

UN-Water, *Monitoring Water and Sanitation in the 2030 Agenda for Sustainable Development: An Introductory Guide* (2016) <http://www.unwater.org/publications/publications-detail/en/c/379864/>.

UN-Water, *Compendium of Water Quality Regulatory Frameworks: Which Water for Which Use?* (2015) <http://www.unwater.org/publications/publications-detail/en/c/357645/>

Victorian Equal Opportunity & Human Rights Commission, *2013 Report on the Operation of the Charter of Human Rights and Responsibilities* (2013) <http://www.humanrightscommission.vic.gov.au/index.php/our-resources-and-publications/charter-reports/item/844-2013-report-on-the-operation-of-the-charter-of-human-rights-and-responsibilities>

Walmsley, Rachel, and Elizabeth McKinnon, 'In Defence of Environmental Laws: ANEDO and COAG's Environmental Reform Agenda' (2012) 3 *National Environmental Law Review* 32

Watchirs, Helen, and Gabrielle McKinnon, 'Five Years' Experience of the *Human Rights Act 2004* (ACT): Insights for Human Rights Protection in Australia' (2010) 33 (1) *UNSW Law Journal* 136

Watters, Rupert, *Costing the Earth? The Case for Public Interest Costs Protection in Environmental Litigation* (2010) Environment Defenders Office (Victoria) Ltd <https://envirojustice.org.au/sites/default/files/files/Submissions%20and%20reports/protectivp_costs.pdf>

Waugh, John, 'Australia's State Constitutions, Reform and the Republic' (1996) 3 (1) *Agenda* 59

Waye, Vicki and Christina Son, 'Regulating the Australian Water Market' (2010) 22 (3) *Journal of Environmental Law* 431

Webb, Romany, 'Water Quality' in Kate Stoeckel, Romany Webb, Luke Woodward and Amy Hankinson (eds), *Australian Water Law* (Thomson Reuters 2012) 531

Webber, Jeremy, 'A Modest (but Robust) Defence of Statutory Bills of Rights' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate Publishing, 2006) 263

Weiden, David L, 'Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia' (2011) 64 (2) *Political Research Quarterly* 335

Weston, Burns H, and David Bollier, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons* (Cambridge University Press, 2013)

Weston, Burns, and David Bollier, *Regenerating the Human Right to a Clean and Healthy Environment in the Commons Renaissance* (2011) 24 <http://www.commonslawproject.org/>

Welling, Judith, ‘International Indicators and Economic, Social and Cultural Rights’ (2008) 30 (4) *Human Rights Quarterly* 933

White, Rob, *Crimes Against Nature: Environmental Criminology and Ecological Justice* (Willan Publishing, 2008)

Whittemore, Mary Elizabeth, 'The Problem of Enforcing Nature's Rights Under Ecuador's Constitution: Why the 2008 Environmental Amendments Have No Bite' (2011) 20 (3) *Pacific Rim Law & Policy Journal* 659

Williams, George, and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013)

Williams, George, and Lisa Burton, ‘Australia’s Exclusive Parliamentary Model of Rights Protection’ (2013) 34 (1) *Statute Law Review* 58

Williams, George, ‘Critique and Comment: The Victorian *Charter of Human Rights and Responsibilities*: Origins and Scope’ (2006) 30 *Melbourne University Law Review* 880

Williams, George, *A Bill of Rights for Australia* (University of New South Wales Press, 2000)

Winterton, George, ‘A Framework for Reforming the External Affairs Power’ (Paper presented at the Fifth Conference of The Samuel Griffith Society, Sydney, 1995) <http://www.samuelgriffith.org.au/papers/html/volume5/v5chap2.htm>

Wolfe, Karrie, 'Greening the international human rights sphere? Environmental rights and the Draft Declaration of Principles on Human Rights and the Environment' (2003) 9 *Appeal, Review of Current Law and Law Reform* 45

Cases

Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development (2014) 254 CLR 394

Arnold v Minister Administering the Water Management Act 2000 (No 6) [2013] NSWLEC 73

Arnold v Minister Administering the Water Management Act 2000 (2010) 240 CLR 242

Australian Conservation Foundation Inc v Commonwealth (1980) 146 CLR 493

Bandhua Mukti Morcha v Union of India, 3 S.C.C. 161 (1984)

Barrington - Gloucester - Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure [2012] NSWLEC 197

Commonwealth of Australia Constitution Act 1900 (Imp)

Commonwealth v Australian Capital Territory (2013) 250 CLR 441

Commonwealth v Tasmania (1983) 158 CLR 1

EPA v CSR Building Products Ltd [2008] NSWLEC 224

EPA v Waste Recycling and Processing Corporation (2006) 148 LGERA 299

ICM Agriculture Pty Ltd v Commonwealth (2009) 240 CLR 140

Koowarta v Bjelke-Petersen (1982) 153 CLR 168

Mabo v Queensland [No 2] (1992) 175 CLR 1

Mehta v Union of India et al, 1988 A.I.R. 1115

Momcilovic v The Queen (2011) 245 CLR 1

North Sea Continental Shelf cases (Germany v Denmark, Germany v The Netherlands) ICJ Rep (1969) 3

Polyukovich v The Commonwealth (1991) 172 CLR 501

R v David Arthur Fearnside [2009] ACTA 3 (24 February 2009)

R v Sharkey (1949) 79 CLR 121

Roach v Electoral Commissioner (2007) 233 *CLR* 162

SERAC v. Nigeria, Case No. ACHPR/COMM/A044/1, ¶ 51 (Afr. Comm'n Hum. & Peoples' Rts. May 27, 2002)

Subhash Kumar v State of Bihar A.I.R. 1991 SC 420

Thomas v Mowbray (2007) 233 CLR 307

Tooheys Ltd v Minister for Business and Consumer Affairs (1981) 36 ALR 64

Victoria v Commonwealth (1996) 187 CLR 416

Whitewood v Wolf 1:13-cv-1861 (MD Penn, 2014)

Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (1996) 189 CLR 1

XYZ v Commonwealth (2006) 227 CLR 532

Legislation

Acts Interpretation Act 1901 (Cth)

Administrative Decisions (Judicial Review) Act 1977 (Cth)

Age Discrimination Act 2004 (Cth)

Australian Capital Territory (Self-Government) Act 1988 (Cth)

Australian Constitution

Australian Crime Commission Act 2002 (Cth)

Australian Human Rights Commission Act 1986 (Cth)

Basin Plan 2012 (Cth)

Biosecurity Act 2015 (Cth)

Catchment Management Authorities Act 2003 (NSW)

Charter of Human Rights and Responsibilities Act 2006 (Vic)

Constitution of Ecuador

Constitution of India

Constitution of Latvia

Constitution of the United States of America

Contaminated Land Management Act 1997 (NSW)

Disability Discrimination Act 1992 (Cth)

Environmental Planning and Assessment Act 1979 (NSW)

Environmental Protection Act 1997 (ACT)

Environment Protection and Biodiversity Conservation Act 1999 (Cth)

Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014 (Cth)

Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (Cth)

Euthanasia Laws Act 1997 (Cth)

Federal Court of Australia Act 1976 (Cth)

Human Rights Act 2004 (ACT)

Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)

Human Rights (Sexual Conduct) Act 1994 (Cth)

Local Government Act 1993 (NSW)

Marriage Act 1961 (Cth)

National Environment Protection Council Act 1994 (Cth)

National Environment Protection (National Pollutant Inventory) Measure 1998 (Cth)

National Water Commission (Abolition) Bill 2014 (Cth)

National Water Commission Act 2004 (Cth)

Northern Territory (Self-Government) Act 1978 (Cth)

Political Constitution of the United Mexican States

Protection of the Environment Administration Act 1991 (NSW)

Protection of the Environment Operations Act 1997 (NSW)

Racial Discrimination Act 1975 (Cth)

Sex Discrimination Act 1984 (Cth)

Vexatious Proceedings Act 2005 (Qld)

Water Act 2007 (Cth)

Water Bill 2014 (Vic)

Water Management Act 2000 (NSW)

Water Resources Act 2007 (ACT)

World Heritage Properties Conservation Act 1983 (Cth)

Treaties and other international agreements

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador) opened for signature 17 November 1988, OAS Treaty Series No. 69 (entered into force 29 November 1999)

African [*Banjul*] *Charter on Human and Peoples' Rights opened for signature 27 June 1981*, 1520 *UNTS* 217 (entered into force 21 October 1986)

Arab Charter on Human Rights opened for signature 22 May 2004, reprinted in 12 IHRR 893 (2005) (entered into force 15 March 2008)

Convention Concerning the Protection of the World Cultural and Natural Heritage, opened for signature 23 November 1972, 1037 UNTS 151 (entered into force 15 December 1975)

Convention on Access to Information, Public Participation in Decision Making, and Access to Justice in Environmental Matters, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001)

Convention on Biological Diversity, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993)

Convention on the Conservation of Migratory Species of Wild Animals, opened for signature 23 June 1979, 1651 UNTS 333 (entered into force 1 November 1983)

Convention on the Elimination of All Forms of Discrimination against Women opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981)

Convention on the Rights of the Child opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)

Convention on International Trade in Endangered Species of Wild Fauna and Flora, opened for signature 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975)

Convention on Wetlands of International Importance especially as Waterfowl Habitat, opened for signature 2 February 1971, 996 UNTS 245 (entered into force 12 December 1975)

International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976)

International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 21 December 1965, UNTS 660 195 (entered into force 4 January 1969)

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, opened for signature 24 September 2009, UN GA Res A/RES/63/117 (entered into force 5 May 2013)

Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976)

Rio Declaration on Environment and Development, 31 ILM 874 (1992)

Statute of the International Court of Justice, opened for signature 26 June 1945, 33 U.N.T.S. 993 (entered into force 24 October 1945)

Stockholm Declaration on the Human Environment, UN Doc A/CONF.48/14/Rev.1 (1972)

Universal Declaration of Human Rights, GA res. 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948)

Other

ABC, *Federal EPA Would Depoliticise Environmental Assessment – Expert*, 28 May 2014 <http://www.abc.net.au/radionational/programs/breakfast/federal-epa-would-depoliticse-environmental-assessment---expert/5482980>

Agriculture and Resource Management Council of Australia and New Zealand and Australian and New Zealand Environment and Conservation Council, *Rural Land Uses and Water Quality: A Community Resource Document* (2000) <http://www.environment.gov.au/water/publications/quality/pubs/rural-land-uses-paper9.pdf>

Australian and New Zealand Environment and Conservation Council and Agriculture and Resource Management Council of Australia and New Zealand, *An Introduction to the Australian and New Zealand Guidelines for Fresh and Marine Water Quality* (2000) <http://www.environment.gov.au/water/publications/quality/pubs/nwqms-intro-4a.pdf>

Australian and New Zealand Environment and Conservation Council and Agriculture and Resource Management Council of Australia and New Zealand, *Australian Guidelines for Water Quality Monitoring and Reporting: Summary* (2000) <http://www.environment.gov.au/water/publications/quality/pubs/nwqms-monitoring-reporting-summary.pdf>

Australian Bureau of Statistics, *Water Account Australia 2009-2010* (2011) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/CAE301277A675941CA257956000E646E?opendocument>

Australian Conservation Foundation and Environment Victoria, Submission 147 to Select Committee on the Murray-Darling Basin Plan, Parliament of Australia, *Inquiry into the Murray-Darling Basin Plan*, September 2015

Australian Conservation Foundation, Submission 15 to Senate Environment and Communications Legislation Committee, Parliament of Australia, *Inquiry into National Water Commission (Abolition) Bill 2014* 13 October 2014

Australian Conservation Foundation, *ACF Submission on the Draft Murray-Darling Basin Plan 2011* (2012) <https://www.acfonline.org.au/sites/default/files/resources/ACFBasinPlanSubmission160412.pdf>

Australian Government, *About Waterwatch Australia* <http://www.waterwatch.org.au/about.html>

Australian Government, *Caring for our Country* (2012) <http://www.nrm.gov.au/>

Australian Government, *Intergovernmental Agreement on the Environment* (1992)

Australian Government, *National Action Plan for Salinity and Water Quality Archive* (2008) <http://www.napswq.gov.au/napswq/index.html>

Australian Government, *Water resources – Quality*, Australian Natural Resources Atlas <http://www.anra.gov.au/topics/water/quality/index.html>

Australian Government, *Wetlands of international importance (Ramsar wetlands)* (2011) <http://www.environment.gov.au/epbc/protect/wetlands.html>

Australian Human Rights Commission, *Australian Human Rights Commission Submission to the United Nations Committee on Economic Social and Cultural Rights Review of Australia's Fourth Periodic Report on the Implementation of the International Covenant on Economic Social and Cultural Rights* (2009) [4.1 (a)] <https://www.humanrights.gov.au/review-australia-s-fourth-periodic-report-implementation-international-covenant-economic-social-and#4_1>

Australian Human Rights Commission, *Casenote: FKAG v Australia and MMM v Australia* (2013) <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/casenote-fkag-v-australia-and-mmm-v-australia>

Australian Human Rights Commission, *CESC Concluding Observations 2009* <https://www.humanrights.gov.au/cesc-concluding-observations-2009>

Australian Human Rights Commission, *How are Human Rights Protected in Australian Law?* <https://www.humanrights.gov.au/how-are-human-rights-protected-australian-law>

Australian Human Rights Commission, *Scrutiny under the International Covenant on Economic Social and Cultural Rights* <https://www.humanrights.gov.au/scrutiny-under-international-covenant-economic-social-and-cultural-rights>

Australian Network of Environmental Defender's Offices, *About Us* <http://www.edo.org.au/>

Australian Pork Limited, *Sustainable Piggery Effluent Utilisation in Australian Farming Systems: Case studies on the development and implementation of Nutrient Management Plans at ten Australian piggeries* (2011) <http://www.australianpork.com.au/pages/images/Nutrient%20Case%20Studies%20-%20Final%20design%20-%20web%20low%20res.pdf>

Biodiversity Indicators Partnership, *The Indicators* <http://www.bipindicators.net/>

Brandis, George, *Government Acts to Protect Jobs From Vigilante Litigants* (Media Release, 18 August 2015)

Bureau of Meteorology (Australia), *About the Water Market* <http://www.nationalwatermarket.gov.au/about/index.html>

Bureau of Meteorology (Australia), *Water Market Information* <http://www.nationalwatermarket.gov.au/>

Campbell, Kenneth, *Legal Rights* (2013) Stanford Encyclopedia of Philosophy <http://plato.stanford.edu/entries/legal-rights/>

Campbell, Kenneth, *Rights* (2013) Stanford Encyclopedia of Philosophy <http://plato.stanford.edu/entries/rights/#2.2>

Center for Economic and Social Rights, *Key Links and Resources for Monitoring ESC Rights* (2012) <http://www.cesr.org/article.php?id=318>

Committee on Economic, Social and Cultural Rights, *Fact Sheet No.16 (Rev.1), The Committee on Economic, Social and Cultural Rights* (1991) 3 <http://www.ohchr.org/Documents/Publications/FactSheet16rev.1en.pdf >

Commissioner for Environmental Sustainability Victoria, *Victoria State of the Environment 2013* (2013) <https://www.ces.vic.gov.au/sites/default/files/publication-documents/Introduction.pdf>

Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 2015

Commonwealth, *Parliamentary Debates*, Senate, 14 September 2015

Commonwealth, *Parliamentary Debates*, Senate, 25 September 2014, 7110 (Mitch Fifield)

Community Environmental Legal Defense Fund, *Community Rights* <http://www.celdf.org/section.php?id=423>

Community Environmental Legal Defense Fund, *First-in-the-Nation Action - Ecosystem Files for Intervention in Lawsuit to Defend Own Legal Rights to Exist and Flourish* (2014) <http://www.celdf.org/press-release-first-in-nation-ecosystem-files-to-defend-legal-rights-to-exist--flourish>

Conca, Ken, 'Environmental Human Rights: Greening "The Dignity and Worth of the Human Person"' in Peter Dauvergne (ed), *Handbook of Global Environmental Politics* (Edward Elgar, 2nd ed, 2012) <http://search.credoreference.com/content/entry/elgargep/environmental_human_rights_greening_the_dignity_and_worth_of_the_human_person/0?id=10944418>

Council of Australian Governments Standing Council on Environment and Water, *COAG Standing Council on Environment and Water Terms of Reference* (2012) <http://www.scew.gov.au/publications/pubs/coag-standing-council-on-environment-and-water-terms-of-reference.pdf>

Council of Australian Governments, *Intergovernmental Agreement on a National Water Initiative* (2004) [4] <http://nwc.gov.au/__data/assets/pdf_file/0008/24749/Intergovernmental-Agreement-on-a-national-water-initiative.pdf>

Council of Australian Governments, *Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment* (1997)

Department of Environment & Climate Change (NSW), *NSW Diffuse Source Water Pollution Strategy* (2009) 9 <http://www.environment.nsw.gov.au/resources/water/09085dswp.pdf>

Department of Environment and Heritage Protection (QLD), *State of the Environment Queensland 2011* (2011) <http://www.ehp.qld.gov.au/state-of-the-environment/report-2011/pdf/executive-summary.pdf>

Department of Environment, Land, Water and Planning (Vic), *Water Entitlements and Trade* <http://www.depi.vic.gov.au/water/governing-water-resources/water-entitlements-and-trade>

Department of Foreign Affairs and Trade (Cth), *Environment and Sea Law* <http://dfat.gov.au/international-relations/themes/environment-sea-law/pages/environment-and-sea-law.aspx>

Department of Land & Water Conservation (NSW), *The NSW Groundwater Quality Protection Policy: A Component Policy of the NSW State Groundwater Policy* (1998) <http://www.water.nsw.gov.au%2FArticleDocuments%2F34%2Fnsw_state_groundwater_quality_policy.pdf.aspx&ei=sHm7T862M46iiAeLhf2ICQ&usg=AFQjCNEVVQEkHwD7TZfKxIuOLmch1pHzKg>

Department of Primary Industries (NSW), *Law and Policy* <http://www.water.nsw.gov.au/water-management/law-and-policy>

Department of the Environment (Cth), *About Commonwealth Environmental Water* <https://www.environment.gov.au/water/cewo/about-commonwealth-environmental-water>

Department of the Environment (Cth), *About the NPI* <http://www.npi.gov.au/npi/index.html>

Department of the Environment (Cth), *Compliance and Enforcement Policy: Environment Protection and Biodiversity Conservation Act 1999* (2013) <https://www.environment.gov.au/epbc/publications/epbc-compliance-and-enforcement-policy>

Department of the Environment (Cth), *Environmental Water Recovery Strategy for the Murray-Darling Basin* (2012) <http://www.environment.gov.au/system/files/consultations/c876fb55-785c-4fb4-8759-720c7be86f9d/files/draft-recovery-strategy.pdf>.

Department of the Environment (Cth), 'Independent Review of the 2013 EPBC Act Amendment – Water Trigger' (2016) <https://www.environment.gov.au/epbc/what-is-protected/water-resources/review>

Department of the Environment (Cth), *Intergovernmental Agreement on the Environment 1992* <https://www.environment.gov.au/about-us/esd/publications/intergovernmental-agreement>

Department of the Environment (Cth), *Legislation* <https://www.environment.gov.au/about-us/legislation>

Department of the Environment (Cth), *National Strategy for Ecologically Sustainable Development 1992* <http://www.environment.gov.au/about-us/esd/publications/national-esd-strategy>

Department of the Environment (Cth), *National Water Initiative* <https://www.environment.gov.au/topics/water/australian-government-water-leadership/national-water-initiative>

Department of the Environment (Cth), *National Water Quality Management Strategy* (2012) <http://www.environment.gov.au/water/policy-programs/nwqms/index.html>

Department of the Environment (Cth), *Sustainability Indicators for Australia* <http://www.environment.gov.au/topics/sustainable-communities/measuring-sustainability/sustainability-indicators>

Department of the Environment (Cth), *Water Resources – 2013 EPBC Act Amendment – Water Trigger* <http://www.environment.gov.au/epbc/what-is-protected/water-resources>

Department of the Environment (Cth), *What is Protected Under the EPBC Act?* <https://www.environment.gov.au/epbc/what-is-protected>

Department of the Environment (Cth), *The Council of Australian Governments' Water Reform Framework* (1994) <https://www.environment.gov.au/resource/council-australian-governments-water-reform-framework>

Division for Sustainable Development, United Nations Department of Economic and Social Affairs, *Indicators in the Transforming Our World – The 2030 Agenda for Sustainable Development* <https://sustainabledevelopment.un.org/topics/indicators>

Environment Defenders Office (NSW) and Environment Defenders Office (Victoria) Ltd, *Protection of Human Rights and Environmental Rights in Australia* (2009) <https://envirojustice.org.au/downloads/files/law_reform/edo_vicnsw_humanrights_environment.pdf>

Environmental Defender's Office (NSW), *Technical Fact Sheet: Groundwater* <http://www.edo.org.au/edonsw/site/factsh/fs05_6.php#10>

Environmental Defender's Office (NSW), *Water, Air and Noise Pollution* <http://www.edo.org.au/edonsw/site/factsh/fs04_1.php>

Environmental Defenders Offices of Australia, *Policy Submissions* <http://www.edo.org.au/submissions>

Environmental Defenders Office (QLD), *Court Cases* <http://www.edoqld.org.au/court-cases/>

Environment Protection Authority (SA), *State of the Environment Report 2013 South Australia* (2013) <http://www.epa.sa.gov.au/soe_2013/index.html>

Environmental Protection Authority (WA), *State of the Environment Report 2007* (2007) <http://www.epa.wa.gov.au/abouttheepa/soe/2007/Pages/default.aspx>

General Comment No. 15: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, UNCESCR, 29th sess [5], E/C.12/2002/11 (2002)

General Comment No. 14: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, UNCESCR, 22nd sess, E/C.12/2000/4 (2000)

General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), UNCESCR, 5th sess, E/1991/23 (1991)

Global Alliance for the Rights of Nature, *Universal Declaration of Rights of Mother Earth* <http://therightsofnature.org/universal-declaration/>

Greene, Natalia, 'Rights of Nature and Ecuador's Constitutional Reform' Conference presentation delivered at the Wild Law Conference 2013 in Brisbane, Australia, 27 September 2013.

Greene, Natalia, *The First Successful Case of the Rights of Nature Implementation in Ecuador*, Global Alliance for the Rights of Nature <http://therightsofnature.org/first-ron-case-ecuador/>

High Court of Australia, 'Momcilovic v The Queen & Ors [2011] HCA 34' (2011) <http://www.hcourt.gov.au/assets/publications/judgment-summaries/2011/hca34-2011-09-08.pdf>

Hunt, Greg, Barnaby Joyce and Bob Baldwin, 'Bill to Cap Water Buyback to 1500GL Introduced to Parliament' (Media Release, 28 May 2015) <http://www.environment.gov.au/minister/hunt/2015/mr20150528.html>

International Law Association, *Berlin Rules on Water Resources* (2004) 71 ILA 337

Jenkins, Harry, *Human Rights Compatibility: Parliamentary Scrutiny and Human Rights in Australia* (Speech delivered by Harry Jenkins, NSW Bar Association Human Rights Committee Professional Development Seminar, 28 February 2013) <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/~/media/Committees/Senate/committee/humanrights_ctte/statements/2013/pdf/NSW_Bar_Assocn_HumanRightsCommittee_seminar_280213.ashx>

Khan, Stuart, 'Axing Water Overseer Could Leave Regional Australia High And Dry' (2014) *The Conversation* <http://theconversation.com/axing-water-overseer-could-leave-regional-australia-high-and-dry-33093>

Knowles, Craig, 'Sustainable Development and Climate Change: Practical Solutions in the Energy-Water Nexus' (Speech delivered at the UN General Assembly – Thematic Debate, New York, 16 May 2013) <http://www.un.org/en/ga/president/67/issues/climatechange/Panellists/Craig%20Knowles%20Speech%20to%20PGA%20Debate%2016%20May%202013.pdf>.

Law Institute of Victoria, 'Lawyers Disappointed at Charter Wind Back Proposals by Parliamentary Committee' (Media Release, 14 September 2011) <http://www.liv.asn.au>

Liberal Party of Australia, *The Coalition's Policy to Boost Productivity* (2013) <http://lpaweb-static.s3.amazonaws.com/Policies/ProdPolicy10Jul13.pdf>

Lowe, Ian, 'The State of Australia: Our Environment' (2014) *The Conversation* <https://theconversation.com/the-state-of-australia-our-environment-26035>

Loynes, Kate, 'Who Watches the Waters? The End of the National Water Commission' (2014) *Flag Post* <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2014/May/NWC>

Knox, John, *Greening Human Rights* (2015) Open Democracy <https://www.opendemocracy.net/openglobalrights/john-knox/greening-human-rights>

McGrath, Chris, *Publications*, Environmental Law Australia <http://envlaw.com.au/publications/>

McKenzie, Mark, cited in Michael Condon, 'NSW Irrigators Get Anxious About Legislation to Limit the Water Cap', *ABC News* (online), 23 March 2015 < http://www.abc.net.au/news/2015-03-20/nrn-nsw-irrigators-get-anxious-about-cap/6335802>

Murray-Darling Basin Authority, *Guide to the Basin Plan* (2010) <http://thebasinplan.mdba.gov.au/guide/guide.php?document=the-murray-darling-basin&chapter=context-for-decisions>

Murray-Darling Basin Authority, *Irrigated Agriculture in the Basin - Facts and Figures* <http://www.mdba.gov.au/about-basin/irrigated-agriculture-in-the-basin>

Murray-Darling Basin Authority, *Monitoring and Evaluation* <http://www.mdba.gov.au/basin-plan-roll-out/monitoring-evaluation>

Murray-Darling Basin Authority, Submission 243 to Select Committee on the Murray-Darling Basin Plan, Parliament of Australia, *Inquiry into the Murray-Darling Basin Plan*, 25 September 2015
Murray-Darling Basin Authority, *Water Quality* <http://www.mdba.gov.au/basin-plan-roll-out/water-quality-and-salinity>

Murray-Darling Basin Authority, *Water Quality and Salinity Management Plan* (2011) <http://www.mdba.gov.au/sites/default/files/archived/proposed/FS_WQSMP.pdf>

National Irrigators' Council, Submission No 11 to Senate Environment and Communications Legislation Committee, Parliament of Australia, *Inquiry into National Water Commission (Abolition) Bill 2014* 13 October 2014

National Water Commission, Submission No 6 to Senate Environment and Communications Legislation Committee, Parliament of Australia, *Inquiry into National Water Commission (Abolition) Bill 2014* 13 October 2014

National Water Commission, *NWI Objectives* <http://nwc.gov.au/nwi/objectives>

National Water Commission, *Role and Functions* (2015) <http://www.nwc.gov.au/organisation/role>

National Water Commission, *Water Challenges in Australia* <http://nwc.gov.au/publications/topic/corporate/corporate-brochure/corporate-brochure>

New South Wales Irrigators' Council, *Policy for Interaction of Social and Economic Considerations in Setting Sustainable Diversion Limits in the Murray-Darling Basin Plan* <http://www.nswic.org.au/pdf/policy_documents/100311%20-%20Interaction%20of%20SDL%20with%20S&E.pdf>

New Zealand Government, *Ruruku Whakatupua: Whanganui River Deed of Settlement Between the Crown and the Whanganui Iwi* (2014) <https://www.govt.nz/dmsdocument/2731.pdf>

NSW Environment Protection Authority, *NSW State of the Environment 2012* (2012) <https://www.epa.nsw.gov.au/soe/soe2012/summary.htm>

NSW Farmers' Federation, Submission 289 to Select Committee on the Murray-Darling Basin Plan, Parliament of Australia, *Inquiry into the Murray-Darling Basin Plan*, September 2015

Office of Environment & Heritage (NSW), *Contacts for Water Pollution* <http://www.environment.nsw.gov.au/pollution/water.htm>

Office of the Commissioner for Sustainability and the Environment, *ACT State of the Environment Report 2011* (2011) <http://reports.envcomm.act.gov.au/actsoe2011/executive_summary.html>

Pachamama Alliance, *Fundación Pachamama* (2014) <http://www.pachamama.org/advocacy/fundacion-pachamama>

Papaelia, Leana, *ACT Court of Appeal Considers Human Rights Interpretative Principle* (2009) Human Rights Law Centre <http://hrlc.org.au/r-v-fearnside-2009-actca-3-24-february-2009/>

Parker, Fiona, *Local Reaction to the Latest Draft Murray Darling Basin Plan*, *ABC News* (online), 28 November 2011 <http://www.abc.net.au/local/audio/2011/11/28/3378140.htm>

Parliamentary Education Office, *How the Constitution Can Be Changed* (2014) <http://www.peo.gov.au/learning/closer-look/the-australian-constitution/how-the-constitution-can-be-changed.html >

Parliamentary Joint Committee on Human Rights, *Twenty-Seventh Report of the 44th Parliament* (2015)

Parliamentary Joint Committee on Human Rights, *Twenty-Third Report of the 44th Parliament* (2015)

Parliamentary Joint Committee on Human Rights, *Thirteenth Report of the 44th Parliament* (2014)

Report of the World Commission on Environment and Development: Our Common Future, UN Doc A/42/427 (1987) annex I

Select Committee on the Murray-Darling Basin Plan, Parliament of Australia, *Inquiry into the Murray-Darling Basin Plan* (2015)

Taylor, Lenore, 'Burke Fails to Calm Troubled Water Users' *The Sydney Morning Herald* (online), 28 October 2010 <http://www.smh.com.au/environment/water-issues/burke-fails-to-calm-troubled-water-users-20101027-173xz.html>

Taylor, Lenore, 'Basin Plan Gets Bogged Down in Legal Wrangling' *Sydney Morning Herald* (online), 26 October 2010 <http://www.smh.com.au/environment/water-issues/basin-plan-gets-bogged-down-in-legal-wrangling-20101026-172eq.html>

Trenorden, Christine, 'Environmental Legal Aid Slashed When Australia Needs it Most' (2014) *The Conversation* <https://theconversation.com/environmental-legal-aid-slashed-when-australia-needs-it-most-23988>

Türk, Danilo, Special Rapporteur, *The Realization of Economic, Social and Cultural Rights*, UN Doc E/CN.4/Sub.2/1992/16 (3 July 1992)

United Nations Development Programme, *World Leaders Adopt Sustainable Development Goals* (25 September 2015) <http://www.undp.org/content/undp/en/home/presscenter/pressreleases/2015/09/24/undp-welcomes-adoption-of-sustainable-development-goals-by-world-leaders.html>

United Nations Economic and Social Council, *Views: Communication No. 2/2014*, 55th sess, UN Doc E/C.12/55/D/2/2014 (13 October 2015) ('*I.D.G v Spain*')

United Nations Environment Programme, *High Level Expert Meeting on the Future of Human Rights and Environment: Moving the Global Agenda Forward* <http://www.unep.org/environmentalgovernance/Events/HumanRightsandEnvironment/tabid/2046/Default.aspx>

United Nations Human Rights Office of the High Commissioner, *Can Each of Us Claim Economic, Social and Cultural Rights?* <http://www.ohchr.org/EN/Issues/ESCR/Pages/Caneachofusclaimeconomicsocialculturalrights.aspx>

United Nations Office of the High Commissioner for Human Rights, *Frequently Asked Questions*, United Nations <http://www.ohchr.org/EN/AboutUs/Pages/FrequentlyAskedQuestions.aspx>

United Nations Human Rights Office of the High Commissioner, 'Right to sanitation, a distinct human right – Over 2.5 billion people lack access to sanitation' (2015) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16903&LangID=E>

United Nations Human Rights Office of the High Commissioner, *Spain Violated the Rights of a Woman Whose House Risks Being Auctioned – UN Committee* (2015) <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16457&LangID=E>

United Nations Human Rights Office of the High Commissioner, *Special Rapporteur on Human Rights and the Environment (Former Independent Expert on Human Rights and the Environment* <http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SRenvironmentIndex.aspx>

United Nations Human Rights Office of the High Commissioner, *Australia* <http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/AUIndex.aspx>

United States Environmental Protection Agency, *Summary of the Clean Water Act* <http://www.epa.gov/lawsregs/laws/cwa.html>

UN-Water, *About UN-Water* <http://www.unwater.org/about/en/>

Victorian Environmental Water Holder <http://www.vewh.vic.gov.au/home>

Wanganui District Council, *Whanganui River Settlement* (2014) <http://www.wanganui.govt.nz/our-district/whanganui-river-settlement/Pages/default.aspx>

Waters, Larissa, 'Environment to Become 'One Stop Shop' for Big Business' (2011) <http://larissa-waters.greensmps.org.au/content/media-releases/environment-become-%E2%80%98one-stop-shop%E2%80%99-big-business>